IMPEACHING MANUEL L. REAL, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FOR HIGH CRIMES AND MISDEMEANORS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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IMPEACHING MANUEL L. REAL, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FOR HIGH CRIMES AND MISDEMEANORS

THURSDAY, SEPTEMBER 21, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:24 a.m., in Room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

I am going to recognize myself and the Ranking Member for opening statements and then proceed to introduce our two panels today.

Any civil officer, under the Constitution, including Federal judges, should be removed from office if impeached and convicted of treason, bribery or other high crimes and misdemeanors.

But what conduct subjects a civil officer to impeachment? Bribery and treason are fairly straightforward concepts.

Scholars have observed that the term "high crimes and misdemeanors" includes not only crimes for which an indictment may be brought but gray political offenses, corruption, maladministration or neglect of duty involving moral turpitude, arbitrary and oppressive conduct and even gross improprieties by judges and high officers of state.

Against this backdrop, we will review the behavior of U.S. District Judge Manuel L. Real to determine whether he has indulged in impeachable conduct. Specifically we will focus on Judge Real's oversight of a bankruptcy case and related California unlawful detainer action from 2000 to 2001.

In February of 2000, Judge Real interceded on behalf of a defendant known to him named Deborah Canter in a joint bankruptcy and California State unlawful detainer action. The defendant was going through a divorce and was ordered to vacate a home that was held in trust by her husband's family.

The defendant filed a bankruptcy petition that automatically stayed eviction proceedings in October 1999, but the stay was eventually lifted. The defendant, represented by counsel, then signed a stipulation that allowed the State court to issue an eviction notice

in February of 2000, approximately 10 days before Judge Real interceded.

According to portions of a 9th Circuit investigation of the matter, Judge Real received ex parte communications from Ms. Canter before he took action. He was also supervising the defendant as part of her probation in a separate criminal case in which she had pled guilty to perjury and loan fraud.

Judge Real withdrew the complaint from the bankruptcy court and enjoined the State eviction proceeding. The defendant was allowed to live rent-free in a home for a period of years.

When the trustee appealed by the mandamus to the 9th Circuit, Judge Real transferred to case to another district judge. The trustee eventually reclaimed the property on appeal but lost at least $35,000 in rent during the proceedings, and attorneys' fees were substantial.

The 9th Circuit Court of Appeals twice dismissed complaints against Judge Real that were brought under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

In the wake of negative publicity surrounding the case, including a dissent from Judge Kozinski, one of the members of the judicial council investigating Judge Real, Chief Judge Schroeder of the 9th Circuit ordered a special committee to conduct a further investigation of Judge Real's conduct.

The special committee held a closed hearing in Pasadena, California, last August 21st. A second hearing is tentatively slated for November.

Notwithstanding the willingness of the 9th Circuit to review the case again, Judiciary Chairman Sensenbrenner believes that Judge Real's behavior, especially as detailed in portions of the September 29, 2005, judicial order, may rise to the constitutional level of impeachable conduct.

This Subcommittee must consider the totality of Judge Real's behavior. Did his actions in the Canter case, from the time he learned of the bankruptcy and unlawful detainer actions until his rulings were reversed by the 9th Circuit, demean him and the Federal judiciary? Would the public have confidence in such a judge to act ethically and without favoritism in future proceedings?

House Resolution 916 allows the House Committee on the Judiciary, which retains jurisdiction over impeachable issues, to investigate the matter.

Following our hearing and further review by the Subcommittee, we will develop a report that includes findings of fact and recommendations that will be submitted to the full Committee.

Our goal today really is two-fold. First, we want to determine what actually occurred when Judge Real presided over the Canter case in 2000 and 2001. And second, we need to learn more about existing impeachment precedents and whether they have application to Judge Real's alleged behavior.

None of us on the Subcommittee relishes this undertaking. This is an exercise that we will approach with an open mind about the facts and the application of existing impeachment precedents. But this is one of the few ways available to Congress to ensure that the Federal judiciary retains its integrity and serves the public's interest.

This point is emphasized by this week's release of the long-awaited Breyer Commission report on the operations of the judicial misconduct statutes. Among other revelations, the report concludes that the 9th Circuit has not handled the investigation of the case in the proper way, which lends greater validity to the need for our Subcommittee to conduct this hearing.

That concludes my opening statement. And the gentleman from California, Mr. Berman, is recognized for his.

Mr. BERMAN. Thanks very much, Mr. Chairman.

One of the primary responsibilities of this Subcommittee is to work to ensure that our judicial branch maintains its independence. Therefore, while they may be a question as to whether certain judicial behavior was or was not appropriate and what the correct response should be, this congressional hearing on the impeachment of Judge Manuel Real is premature.

As I understand it, the 9th Circuit, on May 23, 2006, convened a special committee to investigate the charges against Judge Real, and that a closed-door hearing on the matter was held on August 21, 2006. The investigation is ongoing.

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 established our current system of judicial self-discipline. It authorized the establishment of a judicial council in each of the 13 Federal circuits that would be responsible for the review of complaints against Federal judges, and it empowers the judges to suspend the judge or publicly or privately reprimand the judge.

When a complaint is received, the chief judge reviews it and either dismisses the complaint as baseless or, if it has merit, the chief judge can assemble a special committee to make factual findings and refer the matter to the entire judicial council, who may then conduct any additional investigation it deems necessary.

Finally, the complaint may be petitioned to the United States Judicial Conference for review. And the Judicial Conference may refer the complaint to the House of Representatives for consideration of impeachment.

Following hearings in this Subcommittee, this act was amended with bipartisan support by the Judicial Improvements Act of 2002. This amendment enables the chief judges to conduct limited inquiries into the complaints.

On April 29th of this year, the Judicial Conference held that it had no jurisdiction to review the judicial council's actions because no special committee had been appointed and factual disputes exist that could benefit from a special committee review.

In May, the 9th Circuit chief judge responded by appointing a special committee to investigate. This special committee investigation is in line with the established procedures, and I contend this is the proper procedure to be followed. So, therefore, I think we should have held off on this hearing in order to allow this special committee to perform its job.

If I just may make two comments in reaction to your opening statements, Mr. Chairman, the first is that I do hope, if the process is for the Subcommittee to make findings, factual issues and recommendations to the full Committee, that we not implement that

process, or certainly not prepare that report, until after we have seen the report of the special committee that is now ongoing.

And the second comment I wanted to make was simply that I am aware of the Breyer Commission's discussion of the different disciplinary cases in the Federal judicial system, and I do want to note that at the end of the report the commission said that, "We believe that appointment of a special committee was called for in the first instance, and that this has now been done."

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Berman.

Without objection, other Members' opening statements will be made a part of the record.

And, Judge Real, I would like to invite you to come forward, if you would. And if you would stay standing, I am going to swear you in.

[Witness sworn.]

Mr. SMITH. Thank you. Please be seated.

Our witness on the first panel is the Honorable Manuel L. Real, U.S. district judge for the Central District of California.

Before his appointment to the Federal bench in 1966, Judge Real served in the Naval Reserve, practiced law, and was both an assistant Federal prosecutor as well as a U.S. attorney for the Southern District of California.

He earned his B.S. degree from the University of Southern California and his law degree from the Loyola Law School in Los Angeles.

Welcome to you, Judge. We have your written statement, which, without objection, will be made a part of the record.

Normally, Judge Real, we limit witnesses to 5 minutes, but today we will be happy to give you 10 minutes and hope that that will be sufficient. And if you will proceed with your testimony.

TESTIMONY OF THE HONORABLE MANUEL L. REAL, UNITED STATES DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge REAL. Thank you, Mr. Chairman and Members of the Committee.

I am here today because a complaint was made, accusing me of judicial misconduct in my handling of a bankruptcy case more than 6 years ago. I am here to tell you that I categorically deny that I have committed any misconduct in any aspect of that case.

In my nearly 40 years on the bench, I have presided over more than 31,000 cases, including thousands of civil and criminal trials. Like most judges, I have had a few complaints of misconduct made about me. However, not one of those complaints was ever found to be true. And I have never been sanctioned for any type of judicial misconduct.

The complaint that brings me here was an accusation that I received a secret letter from a criminal defendant that caused me to decide an issue in her favor in a bankruptcy case. That accusation is untrue.

The complaint was filed by a lawyer who had no connection, involvement or personal knowledge of the bankruptcy case. He has had a personal vendetta against me for over 20 years. In 1984, I

sanctioned that lawyer for his misconduct in a trial that I was handling. Since then, he has made personal attacks against me and has publicly called me "crazy."

He also filed the present complaint against me. His first accusation was that I made decisions in the bankruptcy case because I had an improper personal relationship with the debtor, Deborah Canter. That complaint was investigated by the chief judge of the 9th Circuit and dismissed.

The lawyer appealed. The 9th Circuit judicial council then conducted its own investigation, interviewing at least 15 witnesses. One of its investigators interviewed Ms. Canter's bankruptcy lawyer. He said his wife had told him that she helped Ms. Canter prepare a secret letter to me asking for my help in preventing her eviction. Because of this, the judicial council sent the complaint back to the chief judge for further investigation.

The chief judge, as permitted by the rules, conducted her own investigation. After that investigation, she concluded that there was no credible evidence of a secret letter from Ms. Canter to me. The chief judge dismissed the matter for a second time.

The lawyer appealed again. This time, the judicial council affirmed the dismissal of the chief judge by a 7-3 vote.

One of the dissenting judges, Judge Alex Kozinski, wrote a 39-page opinion in which he concluded that I had received such a secret letter from Ms. Canter. Judge Kozinski's conclusion was based both on erroneous facts and his speculation. However, because of its vitriolic spirit and tone, Judge Kozinski's opinion received widespread news coverage.

At the time, I refused to comment on the accusations made against me and have made no public comments until today. I have submitted my written testimony explaining the background of the bankruptcy case and the complaint of misconduct. I have also submitted an appendix of exhibits which is the evidence the chief judge and the judicial council had when it dismissed the complaint.

Today I would like to make a few additional comments.

The original accusation was that Ms. Canter was receiving special treatment because she reported to me personally, as part of her probation. That is untrue.

In 1998, Ms. Canter pled guilty to making false statements and loan fraud. I sentenced her to 5 years of probation and 2,000 hours of community service. As part of her probation, she was ordered to report to me every 120 days with her probation officer.

That was in no way unusual. Since 1976, I have had a policy of requiring defendants that I place on probation to report to me in person every 120 days with their probation officer to tell me about their continued conduct. The 120-day meetings last no longer than 15 minutes, and the probationer is always accompanied by a probation officer.

Ms. Canter was treated just the same as the more than 1,000 defendants who I have placed on the 120-day programs over the last 35 years. I have not had contact with Ms. Canter other than in open court and at her 120-day meetings with her probation officer.

The original accusation that I became involved with Ms. Canter's bankruptcy because I wanted to benefit her personally, that is also

untrue. I have had 120-day meetings with Ms. Canter. One was in August 1999, and the other in January of 2000.

At the second 120-day meeting, Ms. Canter told me that lawyers for one of her creditors had filed her confidential pre-sentence report in her bankruptcy action.

Pre-sentence reports are confidential records of the court, prepared by the probation department for my use in sentencing criminal defendants. They contain a lot of private information about the defendant. The reports are filed under seal and are not available to the public. As the judge presiding over Ms. Canter's criminal case, I was the only person who could release her pre-sentence report.

In my nearly 40 years on the bench, I had never had another case where someone misused a pre-sentence report.

After this 120-day meeting, I withdrew the reference of Ms. Canter's bankruptcy. This meant that the bankruptcy case was transferred to me for future handling. As a district judge, I am authorized by statute to do this. I took over the bankruptcy case because I wanted to find out if Ms. Canter's pre-sentence report had been misused.

When I got the bankruptcy file, I personally reviewed it. I found out that the pre-sentence report had been filed as part of a motion to lift the automatic stay in her bankruptcy case.

Under the bankruptcy law, all lawsuits against Ms. Canter were automatically stayed when she filed her bankruptcy. This included an unlawful detainer action filed by her father-in-law to evict her from her home. The motion requested the court to lift the stay to the eviction action, so the eviction action could go forward. And the bankruptcy judge, with the probation report in the file, had done so.

I asked my secretary to find out the status of the unlawful detainer action. She contacted the State court and learned that a judgment had been entered. I concluded at that time that the presentence report had been improperly used to lift the automatic stay so that the father-in-law could proceed with the unlawful detainer action.

Therefore, I signed an order in February 2000 staying the unlawful detainer action to maintain the status quo. My reason for doing so was my concern over the misuse of the confidential pre-sentence report. I did not do so to benefit Ms. Canter because she was one of my probationers or because I had any sort of a personal relationship with her.

The other accusation made against me was that I made my rulings in Ms. Canter's bankruptcy because I had received a secret letter from her asking for my help in preventing her eviction. This accusation arose because her former bankruptcy lawyer, Andrew Smyth, told a judicial council investigator that his wife said she helped prepare such a letter.

As part of the chief judge's investigation, my secretary submitted a declaration confirming that I had not received any such letter or any communication from Ms. Canter. Ms. Canter also signed a declaration saying that she had never written or delivered such a letter or other document to me.

I do know that I never received such a letter or any other such document from Ms. Canter. The only document I ever received from Ms. Canter were pleadings filed in her bankruptcy action.

In Judge Kozinski's dissent, he goes into great length to try to prove that I did receive an improper communication from Ms. Canter. In my written testimony, I discuss some of the reasons why he was wrong, and will not repeat that testimony in this opening statement.

In conclusion, I want to say again that the accusations of misconduct made against me are untrue. I did not receive any secret communication from Ms. Canter. I did not make any rulings in her bankruptcy based upon such a communication or for the purpose of benefiting her personally.

I want to thank you for your opportunity for me to make this statement. I would be glad to answer any questions the Committee might have.

[The prepared statement of Judge Real follows:]

PREPARED STATEMENT OF THE HONORABLE MANUEL L. REAL

THE SUBCOMMITTEE ON COURTS, THE INTERNET AND INTELLECTUAL PROPERTY

TESTIMONY OF
THE HONORABLE MANUEL L. REAL
SEPTEMBER 21, 2006

We are here today because a lawyer who has had a personal vendetta against me for over twenty years filed a complaint accusing me of misconduct in my handling of a bankruptcy case. That lawyer had no personal involvement in the bankruptcy case and his accusations were based solely on his speculation. His accusations are untrue. Though I regret the circumstances that bring me here, I welcome the opportunity to respond to those accusations.

I. PERSONAL BACKGROUND

My parents were immigrants from Spain who came to California and settled in San Pedro, California. I was born and raised in San Pedro and have lived there my entire life. During World War II, I served in the United States Navy and was discharged with the rank of Lieutenant (JG). After the war, I attended the University of Southern California and then Loyola Law School, where I graduated in 1951.

I was an Assistant United States Attorney for three years after law school, and then went into private law practice. In 1964, I was appointed as the United States Attorney for what was then the Southern District of California. I served in that position until 1966, when President Lyndon Johnson nominated me to be a United States District Judge for the Central District of California.

On November 17th of this year, I will have been a United States District Judge for forty years. During that time, I have handled over 31,000 cases and have presided over thousands of civil and criminal trials. From 1982 to 1993, I was privileged to serve as the Chief Judge for the Central District of California. I have also served as an elected member of the Judicial Conference of the United States and as a member of the Ninth Circuit Judicial Council and Judicial Conference.

In my years as a federal judge, I have won various awards, including the Award of Merit from the Urban League, the Distinguished Achievement Award from Loyola Law School, the Foundation for Improvement of Justice Award, and the Los Angeles County School District Award.

In the 1970s, I handled a desegregation case involving the Pasadena public schools and was the first district judge outside of the South to order a public school system to integrate, and I now have a California elementary school named after me. Needless to say, that ruling, along with several other tough decisions I have had to make, generated significant controversy and public attention. Every case that a judge decides disappoints the losing party and leaves one of the litigants unhappy.

In my nearly forty years on the bench, I have had several complaints of judicial misconduct made against me. However, none of them, including the one that brings me here today, has been found to have any merit, and I have never been sanctioned for any judicial misconduct

II. DEBORAH CANTER'S BANKRUPTCY ACTION

Because of the complaint of misconduct and the criticism that followed Judge Kozinski's intemperate dissent to the Judicial Council's opinion dismissing that complaint, my involvement in the bankruptcy action filed by Deborah Canter has been blown out of proportion. In truth, Ms. Canter was just one of the more

than one thousand criminal defendants who have appeared before me, pleaded guilty and been placed on probation.

I have not had any contact with Ms. Canter other than in open court or at open-door probationary meetings in my office, where she was always accompanied by her Probation Officer. Those meetings lasted no more than fifteen minutes. Other than that, I have never met with or spoken to Ms. Canter or received any letter or other written communication from her.

I became involved in Ms. Canter's bankruptcy action solely because lawyers for her father-in-law had illegally filed in her bankruptcy action a confidential Pre-Sentence Report from her criminal case. Pre-Sentence Reports of criminal defendants are not public documents, but rather are confidential records of the court. The Central District Criminal Rules require that the documents be filed under seal. As I was the judge presiding over her criminal action, Ms. Canter's Pre-Sentence Report could only be released by my order. In my nearly forty years on the bench, I had never had another criminal case where someone misused a confidential Pre-Sentence Report.

A. Ms. Canter's Probation

Ms. Canter entered a guilty plea to charges of making false statements and loan fraud. On April 13, 1999, I sentenced her to five years of probation under the supervision of the U.S. Probation Office and ordered her to perform 2,000 hours of community service, which is a significant amount of community service. I also ordered her to report to me with her Probation Officer every 120 days as directed by the U.S. Probation Office. She did not receive preferential treatment, but was treated the same as all criminal defendants who pleaded guilty and whom I placed on the 120-day probation program.

Approximately eighty percent of the criminal defendants that I place on probation are required to report to me every 120 days. I have won awards for my

program of personally supervising probationers through these periodic meetings. I have been told by Probation Officers that they like the program and that the probationers on it have fewer violations. The probationers who report to me know that the judge who sentenced them cares about their efforts and problems in rehabilitating themselves.

I had two 120-day meetings with Ms. Canter before I withdrew the bankruptcy reference. The first meeting was on August 23, 1999, and Ms. Canter was accompanied by her Probation Officer, Randall Limbach.

Before that meeting, Mr. Limbach sent me a short status report disclosing that Ms. Canter was involved in divorce proceedings and was seeking to gain full custody of her daughter. That issue also was mentioned at the 120-day meeting. Status reports are prepared for all probationers and routinely sent to me in advance of the 120-day meetings.

At my second 120-day meeting with Ms. Canter on January 24, 2000, she told me that attorneys for creditors had filed the confidential Pre-Sentence Report in her bankruptcy action and she was concerned that this might discredit her in the eyes of the bankruptcy judge. She also told me that the report had been filed in state court proceedings, but did not tell me which proceedings. At the meeting, Ms. Canter gave me a cover sheet from a document filed in her bankruptcy action.

I told her to contact her Federal Public Defender regarding the misuse of the Pre-Sentence Report. It was my expectation that her Public Defender would file a motion requesting some sanction against the offending lawyers who had misused a confidential court document.

B. The Withdrawal of the Bankruptcy Reference

After my January 24, 2000 meeting with Ms. Canter and her Probation Officer, I issued an order withdrawing the reference of Ms. Canter's bankruptcy action, which I signed on January 27, 2000. This meant that Ms. Canter's

bankruptcy case would be transferred to me for future handling. As a district judge, I am authorized by statute to withdraw the reference of a bankruptcy case. Though this is usually done at the request of a party to the bankruptcy, the statute specifically permits me to do so without such a request. This was the second time I had withdrawn the reference of a bankruptcy case.

I took over Ms. Canter's bankruptcy case because she told me during the 120-day meeting that her Pre-Sentence Report had been improperly filed in her bankruptcy action and I wanted to determine whether this was true.

On February 24, 2000, the bankruptcy file was transferred to my chambers. After the file arrived, I personally reviewed it and saw that a Request for Judicial Notice had been filed attaching Ms. Canter's Pre-Sentence Report as an exhibit.[1] The Request was filed in support of a motion to lift the automatic stay that was imposed when Ms. Canter filed bankruptcy, and which prevented her father-in-law from prosecuting an unlawful detainer action against her. The motion specifically discussed the confidential Pre-Sentence Report. These documents confirmed Ms. Canter's statements during the January 24, 2000 meeting. The Request for Judicial Notice also contained a copy of the complaint in the unlawful detainer action. The bankruptcy file also showed that the automatic stay had been lifted.

I concluded that the Pre-Sentence Report had been improperly used to lift the automatic stay in order to proceed with the unlawful detainer action against Ms. Canter.

I asked my secretary, Loyette Fisher, to find out the status of the unlawful detainer action. She contacted a state court clerk, who faxed her a copy of the

[1] December 30, 1999 Request for Judicial Notice, without attachments except for the cover page of the Pre-Sentence Report, is attached hereto as Exhibit A. In addition to the documents attached hereto, I am concurrently submitting an Appendix of Exhibits that I believe are relevant to the Subcommittee's investigation.

docket sheet showing the status of the lawsuit. I learned from that document that a judgment had been entered in the unlawful detainer action, shortly after the automatic stay was lifted. Based upon this information, I issued an order on February 29, 2000 staying the unlawful detainer action. I entered the stay order to preserve the status quo in the unlawful detainer action pending further proceedings in the bankruptcy action.

Ms. Canter's Federal Public Defender filed a motion regarding the misuse of her Pre-Sentence Report in March 2000. At the hearing on the motion, I was advised that the father-in-law's bankruptcy attorney and the husband's divorce lawyer would "withdraw" all copies of the Pre-Sentence Report filed with the courts.

I was still concerned that the Pre-Sentence Report had influenced the state divorce court judge's rulings regarding spousal support and child custody issues. Therefore, I ordered the parties to find out whether the Pre-Sentence Report had been considered by that judge in making rulings and, in the meantime, continued the hearing until July 2000. The parties subsequently filed a status report saying they had a conference call with the state court judge who said the Pre-Sentence Report had not influenced him. Accordingly, I canceled the July hearing.

In June 2000, the Canters sought to revive the unlawful detainer action by filing a motion to vacate the order staying that action. I denied the motion because there were two pending actions (the state court divorce action and the bankruptcy action) where the parties were contesting the ownership of the house and I concluded that the determination of that issue should be made in one of those actions.

In May 2001, Ms. Canter's father-in-law filed a second motion to vacate the February 20, 2000 stay order. His attorneys now argued that the state divorce court had determined the issue of ownership of the house and, therefore, the stay

should be lifted so the unlawful detainer action could proceed. They also filed a motion to dismiss the adversary complaint filed in the bankruptcy action by Ms. Canter in which she contended she had an ownership interest in the house.

At the June 2001 hearing, I granted the motion to dismiss the adversary complaint, but gave Ms. Canter an opportunity to file an amended complaint. I did so because I concluded that while the state divorce court had found that Ms. Canter did not have a community property interest in the house, she might be able to allege a claim based upon other legal theories. I denied the motion to vacate the stay because I had given Ms. Canter an opportunity to amend her adversary complaint. I felt that, if she still failed to state a claim in the amended pleading, the father-in-law could simply re-file the motion to vacate the stay.

At the end of this hearing, the attorney for Ms. Canter's father-in-law, Herbert Katz, asked me to state the reasons for my ruling. I told him "because I said so" or words to that effect. Later, I would get much criticism for that comment. However, I had given Mr. Katz a full opportunity to make an oral argument regarding the motion, and did not want to engage in further argument with him over my reasons for denying it. It has never been my practice to explain the reasons for my rulings on motions like this one and I have made similar comments to many other lawyers.

Sometime in the previous month, May 2001, I had a conversation with Judge David Carter regarding the possible transfer of the Canter bankruptcy to him.

I had two concerns that led me to consider transferring the case. First, Judge Carter was handling Anna Nicole Smith's bankruptcy case that raised similar issues as Ms. Canter's adversary complaint. Second, I felt there was a possibility that Ms. Canter's adversary complaint might be tried and I was uncomfortable about trying the case because she was a probationer. Though I had discontinued

my 120-day meetings with Ms. Canter when I took over her bankruptcy case, she was still one of my probationers.

On July 9, 2001, I signed the order transferring Ms. Canter's bankruptcy action to Judge Carter.

In my discussions with Judge Carter, I did not suggest to Judge Carter how he should handle the case after the transfer. I had nothing further to do with Ms. Canter's bankruptcy after ordering the transfer of the case to Judge Carter.

III. MR. YAGMAN'S COMPLAINT OF JUDICIAL MISCONDUCT

Ms. Canter's father-in-law appealed my order staying the unlawful detainer action. On August 15, 2002, the Court of Appeals issued an opinion stating I had abused my discretion when I withdrew the reference in Ms. Canter's bankruptcy action without "good cause" and ordered a stay of the unlawful detainer action. Ms. Canter's bankruptcy lawyer filed a brief in that appeal, but did not tell the Court of Appeals my reason for withdrawing the reference. Therefore, the Court of Appeals did not know about my concern over the misuse of Ms. Canter's Pre-Sentence Report in the bankruptcy action when the court concluded that I did not have "good cause" to do so.

A Los Angeles lawyer, Stephen Yagman, read the Court of Appeals' opinion in the Canter bankruptcy action and filed a complaint against me in March 2003, accusing me of misconduct in my handling of that case. Mr. Yagman was not a party to the bankruptcy action or the lawyer for any party in that proceeding or any other lawsuit involving Ms. Canter, and he knew nothing about the facts of the case.

In 1984, I sanctioned Mr. Yagman $250,000, the amount of the other side's attorneys' fees, for his persistent and willful disregard of the federal rules and his outrageous courtroom behavior in a defamation case I was handling. *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986). Though the Court of Appeals reversed the

sanction portion of my order, Mr. Yagman has had a personal vendetta against me ever since.

I am not the only one. Mr. Yagman has a practice of making outrageous statements against federal judges whom he does not like so that they will disqualify themselves from hearing his cases. Sometimes this is successful. As an example, Mr. Yagman accused another district judge of being "drunk on the bench," "anti-Semitic," and "dishonest." A three-judge disciplinary panel found those accusations to be patently false and suspended Mr. Yagman for two years, finding that he had made the comments for the specific purpose of getting the judge to recuse himself in future cases. *Standing Committee v. Yagman*, 856 F. Supp. 1384, 1395 (C.D. Cal. 1994).

Mr. Yagman appealed and the Ninth Circuit reversed on First Amendment grounds in an opinion written by Judge Alex Kozinski. *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995).

Mr. Yagman was also suspended from practicing law by the California State Bar on two different occasions, and again by the New York State Bar. In June of this year, he was indicted by the U.S. Attorney on nineteen counts of income tax evasion, bankruptcy fraud, and money laundering.

What was Mr. Yagman's complaint against me? Mr. Yagman said he read the Court of Appeals opinion in Ms. Canter's bankruptcy and then learned from the court's records that Ms. Canter was one of my probationers. Based on this alone, Mr. Yagman accused me of acting improperly in "oddly" putting a "comely" female criminal defendant on probation "to himself, personally" and in withdrawing the bankruptcy reference in order to "benefit an attractive female."[2] Both accusations were entirely untrue.

[2] Complaint No. 03-89037, attached hereto as Exhibit B.

Pursuant to the Ninth Circuit Rules on Complaints of Judicial Misconduct, Mr. Yagman's complaint was reviewed by Chief Judge Mary M. Schroeder and, on July 14, 2003, the Chief Judge entered an order dismissing the complaint.[3]

The Chief Judge found that Mr. Yagman's "allegations of inappropriate conduct were not substantiated," since Mr. Yagman had not provided any proof to support his allegation. In addition, the Chief Judge found that my decisions in the bankruptcy case had already been reviewed by the Court of Appeals and, therefore, Mr. Yagman's complaint had to be dismissed under the Ninth Circuit Rules.

Mr. Yagman filed a petition for review of the Chief Judge's dismissal with the Judicial Council on August 7, 2003. In that petition, Mr. Yagman questioned whether his complaint had been adequately investigated and again accused me of being "salaciously cozy" with Ms. Canter. In response to Mr. Yagman's criticism, the Judicial Council conducted its own investigation of the facts underlying Mr. Yagman's complaint. The Judicial Council's staff, under the personal direction of Judge Kozinski, interviewed at least *fifteen* witnesses regarding Mr. Yagman's allegations.

After conducting this investigation, the Judicial Council remanded the complaint to the Chief Judge for further investigation and directed her to investigate whether I entered my orders in the bankruptcy case based upon an improper *ex parte* communication with Ms. Canter. The Judicial Council did this because Ms. Canter's former bankruptcy attorney, Andrew Smyth, had told one of the Judicial Council's investigators that his wife, who was also his secretary, told him she had helped Ms. Canter prepare a letter to me asking for my help in preventing her eviction and that Ms. Canter said she delivered the letter to me.

[3] Chief Judge Schroeder's July 14, 2003 Order and Memorandum, attached hereto as Exhibit C.

During the summer of 2004, Chief Judge Schroeder again reviewed Mr. Yagman's complaint, this time in light of the additional issues raised in the Judicial Council's remand order. Her investigator spoke to Ms. Canter, who denied that she had ever written or delivered a letter or any other document to me or had had any *ex parte* communications of any kind with me.[4] My counsel also filed a brief with Chief Judge Schroeder, attaching the declaration of Ms. Canter's Probation Officer relating the discussions regarding the misuse of the confidential Pre-Sentence Report that occurred during my January 24, 2000 meeting with Ms. Canter, and a declaration from my secretary confirming that I had not received any *ex parte* communication from Ms. Canter.[5]

After a review of this information, Chief Judge Schroeder again dismissed the complaint.[6]

In her order of dismissal, the Chief Judge noted that the Judicial Council's remand order had "focused on the ex parte nature of communications between the judge and the defendant/debtor" and, therefore, she had made an additional inquiry, "including sworn declarations and other documentary evidence." Based upon that information, the Chief Judge concluded that "there is no basis for a finding that credible evidence exists of a letter or other 'secret communication' having passed between the defendant/debtor and the district judge."

Mr. Yagman appealed the Chief Judge's second order of dismissal to the Judicial Council. On September 29, 2005, the Judicial Council denied his petition

[4] September 9, 2004 Declaration of Deborah Canter, attached hereto as Exhibit D.

[5] August 5, 2004 Declaration of Randall Limbach and August 6, 2004 Declaration of Loyette Lynn Fisher, attached hereto as Exhibits E and F.

[6] Chief Judge Schroeder's November 4, 2004 Supplemental Order and Memorandum, attached hereto as Exhibit G.

for review.[7] The majority's opinion specifically dealt with the issue of whether there had been an *ex parte* communication with Ms. Canter, stating:

> The Judicial Council's remand to the Chief Judge indicated concern that the district judge may have received an improper ex parte letter from the probationer, and that the withdrawal of the reference may have been based upon information contained in the alleged letter. *After an investigation, the Chief Judge found that no such letter had been transmitted to, or received by, the district judge. We will not upset that factual finding.*

425 F.3d at 1181 (emphasis added).

The Judicial Council's majority opinion (joined by seven of the ten judges on the Judicial Council) affirmed the Chief Judge's dismissal of Mr. Yagman's complaint. *Id.* at 1182. Three judges dissented, including Judge Kozinski who wrote what I believe to be an intemperate, thirty-nine-page dissenting opinion, reflecting his conclusion that I had committed misconduct. The other two judges who dissented did not join in Judge Kozinski's opinion.

Mr. Yagman requested the Judicial Conference of the United States to review the Judicial Council's opinion. On April 28, 2006, the Judicial Conference Committee issued a decision on that appeal, holding that "Congress gave the Judicial Council final review authority" over the Chief Judge's order of dismissal.

Immediately after the Judicial Council issued its opinion affirming the second dismissal of Mr. Yagman's complaint, he filed a second complaint against me. In his new complaint, Mr. Yagman alleged that I was untruthful in my

[7] *In Re Complaint of Judicial Misconduct*, 425 F.3d. 1179 (9th Cir. 2005), attached hereto as Exhibit H.

response to the Judicial Council's inquiries regarding whether I had an improper *ex parte* communication with Ms. Canter.

A Special Committee appointed by Chief Judge Schroeder held hearings on Mr. Yagman's second complaint in August and I anticipate that the committee will issue a report and recommendation to the Ninth Circuit Judicial Council in the near future.

IV. MR. YAGMAN'S ACCUSATIONS ARE UNTRUE

In his dissent from the Judicial Council's opinion affirming the dismissal of Mr. Yagman's first complaint, Judge Kozinski stated at length why he concluded that there had been an improper *ex parte* communication with Ms. Canter that led me to withdraw the reference and enter the order staying the unlawful detainer action. Judge Kozinski principally relied on the following assumptions to reach those conclusions:

- Judge Kozinski concluded that my October 9, 2003 memorandum to the Judicial Council shows that I acted based upon an *ex parte* communication. 425 F.3d at 1185-87.
- Judge Kozinski believed the story reported by Ms. Canter's former lawyer, Andrew Smyth, that his wife, Michelle Smyth had typed a letter for Ms. Canter and that Ms. Canter later told his wife she had given it to the judge. *Id.* at 1189-90.
- Judge Kozinski concluded that because the judgment in the unlawful detainer action was entered after the January 24, 2000 120-day meeting, there had to have been an *ex parte* communication from Ms. Canter in order for me to know that the judgment had been entered. *Id.* at 1190-92.

These assumptions are wrong and I will explain to the Subcommittee why they are wrong.

A. The October 9, 2003 Memorandum

As part of the Judicial Council's consideration of Judge Schroeder's dismissal of Mr. Yagman's original complaint, Judge Kozinski wrote to me on September 10, 2003, asking me to explain why I withdrew the reference, why I entered the stay order, and whether I had any communication with Ms. Canter regarding these or related issues.

When I received this letter, I was angry over Judge Kozinski's inquiry. I was angry for three reasons: First, Mr. Yagman had sent Judge Kozinski a copy of the first complaint in violation of the Ninth Circuit Rules, leading me to conclude that there was some connection between Judge Kozinski and Mr. Yagman. Second, I believed that Judge Schroeder had properly dismissed Mr. Yagman's complaint. Third, Mr. Yagman had accused me of having a "salaciously cozy" relationship with Ms. Canter at the time of my marriage to Elizabeth Sykes in March 2000.

In preparing my response to Judge Kozinski's September 10, 2003 letter, I did not review Ms. Canter's bankruptcy file because the file had been transferred to Judge Carter in July 2001, and I did not consult with any of my staff or law clerks regarding the response. As a result, my response to Judge Kozinski's letter is inaccurate in its chronology of what I knew when I withdrew the reference and imposed the stay order.

In my October 9, 2003 memorandum, I responded to the question "why did you withdraw the reference" by stating, in part, that "a person who was a probationer in a criminal case informed me that the home in which she and her husband were living at the time of their divorce had been given to them by her husband's parents . . . [and] [s]he was contesting her right to occupancy in the divorce court." Eventually, I did learn of these facts, but only at a later date from pleadings filed in the case. I did not know this information when I issued the order

withdrawing the reference, since it had not come up at my January 24, 2000 meeting with Ms. Canter and Mr. Limbach. Mr. Limbach confirmed what was discussed at this meeting in his declaration. (Exh. E.)

In the October 9, 2003 memorandum, I also said that I learned of the unlawful detainer action at one of my 120-day meetings with Ms. Canter. This, too, is inaccurate. I did not discuss the unlawful detainer action with Ms. Canter at either of the 120-day meetings I had with her. Mr. Limbach, Ms. Canter's Probation Officer, also confirmed this in his declaration. (Exh. E.) I first learned of the unlawful detainer action when I reviewed the bankruptcy file in late February 2000.

Though the October 9, 2003 memorandum is inaccurate as to the timing of when I learned certain information, it does accurately reflect my concern that Ms. Canter's Pre-Sentence Report had been improperly used in the state divorce action and in the bankruptcy action. I learned of this during my January 24, 2000 meeting with Ms. Canter and this was my motivation for withdrawing the reference and issuing the stay order.

Judge Kozinski's conclusion, therefore, that my October 9, 2003 memorandum confirms that an *ex parte* communication with Ms. Canter "must have" occurred is wrong. It is wrong because my memorandum's recitation of the information I had available when I took those actions is incorrect. The memorandum is incorrect because I reacted emotionally when I received Judge Kozinski's inquiry and prepared my response without adequate research or reflection.

I now realize that my failure to respond more carefully and accurately to Judge Kozinski's initial inquiry was a mistake. If I had done so, I doubt that we would be here today.

B. Michelle Smyth's Story

The second "fact" relied upon by Judge Kozinski to support his conclusion that I withdrew the reference and imposed the stay based on an *ex parte* communication was the story of Michelle Smyth, the secretary and wife of one of Ms. Canter's former lawyers. Ms. Smyth told Judge Kozinski's investigator that she had helped Ms. Canter prepare a letter to me regarding her divorce and that Ms. Canter had delivered the letter to me. 425 F.3d at 1189-90.

In contrast with Ms. Smyth's story, Ms. Canter signed a declaration prepared by the Judicial Council's investigator in which she denied that she had ever written or delivered a letter or any other document to me or to anyone in my chambers. She also denied that she had ever met with or had any conversation with me outside of the presence of counsel or a probation officer.

I confirmed the statements of Ms. Canter in a letter that was submitted to Chief Judge Schroeder.[8] In that letter, I truthfully stated that I had never received any letter or written communication of any sort from Ms. Canter or anyone acting for her concerning my intervening on her behalf to prevent her eviction. I also confirmed that I had never been alone with Ms. Canter and had only met with her in the presence of her Probation Officer or in open court.

In addition, my secretary, Loyette Fisher, signed a declaration stating that she had carefully reviewed the files in my chambers relating to Ms. Canter and did not find any letter or other written communication from Ms. Canter to me. (Exh. F.) She also declared that she did not recall ever having received or seen any letter from Ms. Canter to me.

[8] August 10, 2004 letter from Manuel L. Real to Don Smaltz, attached as Exhibit I.

Based upon this information, Chief Judge Schroeder dismissed Mr. Yagman's first complaint, concluding that despite Ms. Smyth's story, there was insufficient evidence to find that there had been an *ex parte* letter or declaration that led me to withdraw the reference and re-impose the stay.

I now know that Ms. Smyth has changed her story. In a recent interview, Ms. Smyth now says that it was not a letter that Ms. Smyth typed, but rather a sworn declaration on twenty-eight line pleading paper.[9]

I do not know why an employee of Ms. Canter's former lawyer would tell a story that is untrue, but I do know that I never received the letter (or declaration) from Ms. Canter that Ms. Smyth said she helped prepare.

C. Knowledge of the Unlawful Detainer Action

The third "fact" relied upon by Judge Kozinski was that the judgment in the unlawful detainer action was not entered until February 7, 2000. 425 F.3d at 1190-91. Based on this timing, Judge Kozinski concluded that Ms. Canter could not have told me of the judgment during the January 24, 2000 meeting and, therefore, I had to have learned of it in a subsequent *ex parte* communication from her.

As discussed above, when the bankruptcy files were routinely transferred to my chambers on February 24, 2000, I personally reviewed those files and learned of the unlawful detainer action. I then asked my secretary to check the status of that action and she obtained the docket sheet from the state court clerk. I learned from the docket sheet that a judgment had been entered and, based on that information, issued my February 29, 2000 stay order.

Judge Kozinski's speculation regarding the source of my knowledge of the unlawful detainer judgment is simply wrong.

---

[9] September 19, 2006 Declaration of Eric L. Dobberteen, attached as Exhibit J.

V. CONCLUSION

The accusations of misconduct made against me by Mr. Yagman are untrue. I did not receive any *ex parte* communication from Ms. Canter. I did not make any rulings in her bankruptcy action based upon any such communication or "to benefit an attractive female" as alleged by Mr. Yagman, an accusation I find repugnant, particularly at my age. I hope that I have fully explained the history of my involvement in Ms. Canter's bankruptcy action and the reasons for my rulings in that action. If not, I welcome any questions the Subcommittee might have.

EXHIBIT A

FILED

99 DEC 30 PM 2:11

CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
FEB 24 2000
CV 00-01185
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

Mark E. Brenner, Cal Bar No. 106962
Attorney at Law
7009 Owensmouth, No. 201
Canoga Park, CA 91303

Telephone: 818.313.9966

Attorney for Creditor Alan Canter and
Canter Family Trust

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re

Deborah M. Canter

CASE NO. ~~LA99-49126 AA~~ SACV 01-688 DOC

(Chapter 13)

REQUEST FOR JUDICIAL NOTICE PURSUANT TO FEDERAL RULE OF EVIDENCE 201

[Filed Concurrently with The Canter Family Trust's Motion for Relief from the Automatic Stay]

Date: 1/26/2000
Time: 2:30 p.m.
Crtm: 1375

TO THE HONORABLE ALAN AHART, THE CHAPTER 13 TRUSTEE, EDWINA DOWELL, THE DEBTOR, AND ALL PARTIES OF INTEREST:

Pursuant to Federal Rule of Evidence, 201 (b),(c) and (d), the moving party requests mandatory and discretionary judicial notice of the following:

1. California Civil Code, Sections 1624 and 1946. Attached as **Exhibit A;**
2. Schedule J of the debtor in the instant case. **Exhibit B;**
3. The petitions and schedules of the prior bankruptcy cases filed by the debtor: case numbers 92-38435 (ch. 7), 96-10153 (ch. 13),

96-16058 (ch. 13), and 97-35894 (ch. 13). At the time of the filing of this motion copies were not available. True and correct copies will be obtained from the court archives and submitted under separate cover as **Exhibits C, D, and E** respectively.

4. The Criminal Judgment and probation report in United States v. Maristina Canter, Case No. 98-576-R . **Exhibit F.**

5. Documents filed with the county recorder of Los Angeles County as follows.

a.	Grant Deed of 9/11/91 to Alan and Elizabeth Canter on property located at 446 S. Highland, Los Angeles	**Exhibit G**
b.	Deed of Reconveyance to Alan and Elizabeth Canter of July 23, 1992 for 446 S. Highland, Los Angeles	**Exhibit H**
c.	Quitclaim deed from Alan and Elizabeth Canter of September 22, 1997 to the Canter Family Trust	**Exhibit I**

6. Unlawful detainer complaint in *Canter v. Canter*, Municipal Court case No. 99U18116. **Exhibit J.**

7. Verified Transcript of debtor's 341a hearing held on December 10, 1999. **Exhibit K.**

8. Interrogatories to and Debtor's Answers to Interrogatories, **Exhibit L.**

Dated: December 29, 1999

Respectfully submitted

Mark E. Brenner, Esq.
Attorney for Creditors Alan Canter and the Canter Family Trust

REQUEST FOR JUDICIAL NOTICE- EXHIBIT F- JUDGMENT AND PROBATION IN CRIMINAL CASE

UNITED STATES DISTRICT CO
LOS ANGELES, CALIFORNIA
PRESENTENCE REPORT

COURT NAME:	T/N: Deborah Maristina Romano	DICTATION DATE
CANTER, Maristina	AKA(s): CANTER, Deborah ROMERO, Deborah ROMEN, Deborah	October 27, 1998
		SCHED. SENT. DATE December 14, 1998
ADDRESS	LEGAL ADDRESS	DOCKET NO.
446 S. Highland Aveune Los Angeles, CA 90036 (323) 935-2520	Same	98-00576
		CITIZENSHIP United States

AGE	RACE	SEX	BIRTH DATE	BIRTH PLACE	EDUCATION
43	White	Female	2-27-55	Los Angeles, CA	12 years

MARITAL STATUS	DEPENDENTS	SOCIAL SECURITY NO.
Married	1 (Daughter)	[redacted]

FBI NO.	U.S. MARSHAL NO.	OTHER IDENTIFYING NOS.:
Not received	13650-112	CA DL: N2384700 CII: None

OFFENSE

18 USC 1001: False Statements (Counts 1, 9 & 14 of 14-Count Indictment), Class D Felonies;
18 USC 1014: Loan Fraud (Count 5), Class B Felony

PENALTY

5 years pursuant to 18 USC 1001 ($250,000 maximum fine pursuant to 18 USC 3571(b)(3) as to Counts 1, 9, & 14]; 30 years and/or $1 million fine pursuant to 18 USC 1014 as to Count 5

CUSTODIAL STATUS	DATE OF ARREST
Released 6-16-98 on $50,000 Appearance Bond with affidavit of surety, no justification, and PSA supervision.	June 16, 1998

PLEA	VERDICT
Guilty, 8-24-98 (Counts 1, 5, 9 & 14)	

DETAINERS/CHARGES PENDING

None

OTHER DEFENDANTS

None

DATE OF NOTIFICATION	DEFENSE COUNSEL:
August 25, 1998	Guy Iverson (Federal Defender) 312 North Spring Street, Suite 1503 Los Angeles, CA 90012 (213) 894-2235

SENTENCING JUDGE	DATE PARTIES NOTIFIED	PROBATION OFFICER
HONORABLE MANUEL L. REAL	November 3, 1998	USPO KELLER, Ext. 6024 SUSPO BARNES, Ext. 5576
	DISCLOSURE DATE 08 1998	

Prob. 2

EXHIBIT B

03-89037

COMPLAINT FOR
JUDICIAL COUNCIL OF THE FIFTH CIRCUIT
COMPLAINT OF JUDICIAL MISCONDUCT AND DISABILITY

MAIL TO FORM ONLY TO THE CLERK, UNITED STATES COURT OF APPEALS, P.O. BOX 193939, SAN FRANCISCO, CA 94119-3939. MARK THE ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE.

SEE RULE 2(e) FOR THE NUMBER OF COPIES REQUIRED FOR FILING.

03-03-03

1. **Complainant's name:** STEPHEN YAGMAN

   Address:
   LAW OFFICE
   YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD
   723 Ocean Front Walk
   Venice Beach, CA 90291-3270

   Daytime telephone: ( ) (310) 452-3200

2. **Name of judge complained about:** MANUEL L. REAL

   Court: C.D. CAL.

3. **Does this complaint concern the behavior of the judge in a particular lawsuit or lawsuits?**
   ☑ Yes ☐ No

   If "yes" give the following information about each lawsuit (use reverse side if there is more than one):

   Court: C.D. Cal.

   Docket Number: See attached

   Are (were) you a party or lawyer in the lawsuit? ☐ Party ☐ Lawyer ☑ Neither

   If a party, give the name, address, and telephone number of your lawyer:

   Docket numbers of any appeals to the Ninth Circuit: See attached

4. **Have you filed any lawsuits against the judge?** ☐ Yes ☑ No

   If yes, give the following information about each lawsuit (use the reverse side if there is more than one):

   Court:

   Present status of suit:

   Name, address, and telephone number of your lawyer:

   Court to which any appeal has been taken:

   Docket number of the appeal:

   Present status of appeal:

5. **Statement of Facts:** On separate sheets of paper, not larger than the paper this form is printed on, describe the facts and evidence that support your charges of misconduct or disability. *See* Rules 1(c) (proper

   See attached

   Stephen Yagman

EXHIBIT B

LAW OFFICES
YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD
723 OCEAN FRONT WALK
VENICE BEACH, CALIFORNIA 90291-3270
(310) 452-3200

STEPHEN YAGMAN

February 7, 2003

Honorable Mary M. Schroeder
Chief Judge
230 North First Avenue
Phoenix, AZ 85025

Re: Complaint against U.S. Dist. Judge Manuel L. Real

Dear Judge Schroeder:

This letter is written to make a complaint against the above-named Judge pursuant to 28 U.S.C. § 372(c), based on the following.

In re Deborah M. Canter: Canter v. Canter, 2002 DJDAR 9407 (9th Cir. August 15, 2002), the owners of Los Angeles' Canter's Delicatessen were stuck for two years, to the tune of $35,000 they never will be able to recoup, until the Ninth Circuit wrested the case away from U.S. Dist. Judge Manuel L. Real, who had hijacked the case from the U.S. Bankruptcy Court in Los Angeles.

Elizabeth and Alan Canter, the owners of Canter's Deli bought a house as an investment in 1991, and rented it out to their son, Gary Canter, who, from 1991 to 1999, lived there with his wife, comely Deborah M. Canter, aka D. Maristina Canter, until their separation. Gary Canter always paid rent to his parents on the house.

In the meantime, Deborah Canter got into some criminal trouble. Her criminal case was assigned to Judge Real. ***He put her on probation***, not to the United States Probation Dept., but rather to ***himself, personally***. The Ninth Circuit disposition omits fact from its opinion probably because this fact was not in the record of this case, but my curiosity in the opinion that led to a little district court docket research revealed this fact.

Deborah Canter stayed on in the Canter house. The Canters filed an unlawful detainer action against her in state court, but the proceedings were stayed twenty-four minutes before the unlawful detainer trial was to have begun, when Deborah Canter filed a Chapter 13 bankruptcy proceeding.

Three months later, on January 26, 2000, the bankruptcy court lifted the stay and allowed the Canter parents to pursue their unlawful detainer action.

On February 7, 2000, Deborah signed a stipulated judgment providing that she would vacate the premises, and judgment was entered.

Judge Real, on February 17, 2000, withdrew the matter from bankruptcy court, and on February 29, 2000 Judge Real stayed enforcement of the state

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STEPHEN YAGMAN

court unlawful detainer judgment, which required Deborah Canter to vacate the premises. She remained on personal probation to Judge Real.

Twice the Canter parents asked Judge Real to lift the stay, and twice Judge Real refused.

When the Canter parents asked Judge Real why the stay was reinstated, his response was "because I said it."

Under then-current federal law Judge Real's refusal to lift the stay was an unappealable interlocutory order. Then this court rendered its disposition.

In *In re Canter*, the Ninth Circuit re-stated the old rule of *Bauman v. United States*, 557 F.2d 650, 654-55 (9th Cir. 1997), that five conditions governed eligibility for mandamus: (1) no other adequate means of relief, such a direct appeal; (2) damage not correctable on appeal; (3) a clearly erroneous order; (4) an oft-repeated error or manifestation of a persistent disregard of federal rules; and (5) new and important problems, or issues of law of first impression. In a rarity, the Circuit found all five factors to be present.

Citing *In re Kemble*, 776 F.2d 802, 806 (9th Cir. 1985), the court restated that it does not "have jurisdiction over interlocutory appeals from orders withdrawing reference of cases to the bankruptcy court." Thus, no direct appeal was available.

The court found the Canters would be damaged and prejudiced in a way not correctable on appeal, citing *DeGeorge v. U.S. Dist. Ct.*, 219 F.3d 930, 934 (9th Cir. 2000). It held the Canters "sit in limbo . . . [and] Deborah [bankrupt and on probation to Judge Real] continues to reside in the property . . . without any rental payments . . . . "

The court held that "[t]he district court's [action] was an inefficient allocation of judicial resources, . . . [r]ather than enhancing efficiency, the district court's action created inefficiency, engendering a series of nonproductive motions and hearings[,] negatively impacted bankruptcy administration by needlessly disrupting the bankruptcy court's seamless processing of the case[,] [and] derailed the [bankruptcy] process provided by statute." Moreover, the court said that "[t]he district court's [action] also resulted in great delay and costs to Appellants[] . . . [and] encouraged forum shopping by essentially reversing the bankruptcy court's prior determinations."

The court found the final two *Bauman* factors met because Judge Real's action "manifests a persistent disregard of the federal court rules," and because the case raised an issue of first impression. The court commented on the phenomenon: "In fact, this case presents the rare circumstance where all the *Bauman* factors favor granting the writ of mandamus[,]" which is what was done.

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STEPHEN YAGMAN

Rather than send the case back to Judge Real, perhaps in light of its knowledge of *Brown v. Baden*, 796 F.2d 1165 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987), a case remanded by the Ninth Circuit to Judge Real in which he simply refused to turn over the files to a new judge, the court itself remanded the case directly to the bankruptcy court.

It would appear to a reasonable observer who knew all these facts that something inappropriate happened here, beyond what the court discussed. What I mean to say is that it appears that Judge Real acted inappropriately to benefit an attractive female whom he oddly had placed on probation to himself, and, if this occurred, then it would constitute extreme judicial misconduct.

It is requested that this matter be appropriately investigated to determine, among other things, the actual relationship between Deborah Canter and Judge Real.

Thank you.

Very truly yours,

STEPHEN YAGMAN

c: Hon. Alex Kozinski

EXHIBIT C

JUDICIAL COUNCIL

FOR THE NINTH CIRCUIT

FILED
JUL 14 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re Charge of)
)
Judicial Misconduct)
)
)
)

No.03-89037
ORDER AND
MEMORANDUM

Before: SCHROEDER, Chief Judge

A complaint of misconduct has been filed against a district judge of this circuit. Administrative consideration of such complaints is governed by the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules), issued pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C. §§ 351-364.

Complainant, an attorney, intimates that the judge acted for his own salacious interests by placing an "attractive female" criminal defendant on probation, "not to the United States Probation Depart., but rather **to himself, personally.**" (Emphasis in original.) He states that "a little district court docket research revealed this fact." Complainant adds that the judge's actions in withdrawing the underlying bankruptcy matter from the bankruptcy court and staying enforcement of the state

EXHIBIT C

unlawful detainer judgment further support the allegation of improper conduct. The Court of Appeals reviewed the judge's withdrawal of the matter from the bankruptcy court, determined that his actions were in error, and remanded the case to bankruptcy court. Complainant requests investigation into the relationship between the judge and the defendant, which was not discussed in the Court of Appeals opinion.

Upon inquiry the allegations of inappropriate conduct were not substantiated. Complainant failed to include any objectively verifiable proof (for example, names of witnesses, recorded documents, or transcripts) supporting his allegations of misconduct. Furthermore, complaints alleging misconduct occurring in open court should be supplied with the specific date of occurrence, the details of the hearing, and if possible, copies of transcripts. Conclusory charges that are unsupported, as here, will be dismissed. 28 U.S.C. § 352(b)(1)(A)(iii); Misconduct Rule 4(c)(3).

The judge's decisions pertaining to the bankruptcy case have already been reviewed by the Court of Appeals. A complaint will be dismissed if it is directly related to the merits of a judge's ruling or decision in the underlying case. 28 U.S.C. § 352(b)(1)(A)(ii); Misconduct Rule 4(c)(1). Charges relating to

those decisions are, therefore, also dismissed.

COMPLAINT DISMISSED.

Mary McClure
Chief Judge

EXHIBIT D

DECLARATION OF DEBORAH M. CANTER

I, DEBORAH M. CANTER, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and, if called upon to testify, I could and would competently testify thereto.

2. I was formerly represented by Andrew Smyth, Esq., in connection with bankruptcy proceedings. At one point in the proceedings I received a call at home from Mr. Smyth's wife and legal secretary, Michelle. She asked me to come in to the office to sign a declaration about an eviction action pending against me. I did so, and at Michelle's request I gave her $50 for an attorney's messenger service to deliver the declaration to the court. Michelle did not specify the addressee, and I do not have a copy of the declaration.

3. Approximately one week later, while I was at home, my mother told me that Mr. Smyth's office was on the phone. Mr. Smyth said that an eviction stay order had been issued.

4. I have never written or delivered a letter or any other document to District Judge Manual Real or to anyone in his chambers.

5. I have never met with, seen, or had any conversation with Judge Real outside the presence of counsel or a probation officer.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

DATED: September 1, 2004

Deborah M. Canter
DEBORAH M. CANTER

EXHIBIT D

EXHIBIT E

DECLARATION OF RANDALL LIMBACH

I, RANDALL LIMBACH, declare as follows:

1. I am a United States Probation Officer and have been so employed since 1998. I have personal knowledge of the matters set forth in this declaration, and if called upon to testify, I would and could competently testify thereto.

2. On about April 15, 1999, the case of *United States v. Deborah Canter* was assigned to me, in my capacity as a Probation Officer. Ms. Canter had been sentenced upon her conviction of federal criminal violations to five years probation and 2,000 hours of community service by U.S. District Judge Manuel L. Real.

3. Even prior to Ms. Canter's case having been assigned to me, I was familiar with Judge Real's successful "120 Day Program" of periodically meeting with probationers to encourage their rehabilitation and participation in community service programs. In my opinion it is a valuable program that is helpful to probationers.

After Ms. Canter's case was assigned to me, and Judge Real placed her on probation, I assisted in coordinating meetings amongst Ms. Canter, Judge Real and me in Judge Real's Chambers.

4. Judge Real's meetings with probationers generally lasted approximately fifteen (15) minutes and the Probation Officer was present at the meetings. Ms. Canter's case was treated no differently.

5. On April 20, 1999, Ms. Canter and I had our first meeting, and I made arrangements for her to comply with her community service obligations as a volunteer with AIDS Project LA.

6. On August 23, 1999, Ms. Canter and I met with Judge Real for her first 120-day meeting during which Judge Real explained the purpose and goals of the program to her. I was present for the entire meeting.

7. On January 24, 2000, Ms. Canter and I met with Judge Real for her second "120-Day" meeting. During the course of this meeting, Ms. Canter advised Judge Real that the confidential probation report from her criminal case had been used against her by counsel for her creditors in a bankruptcy case that she had filed in the District Court. I observed Ms. Canter provide Judge Real with a copy of the bankruptcy case cover sheet. Judge Real advise her to confer with her criminal attorney, Guy Iverson, concerning her complaint that confidential information from her criminal case had been improperly disclosed in the Bankruptcy proceeding.

At this meeting, Judge Real inquired of me if Ms. Canter had provided this same information to me and I informed Judge Real that she had. Judge Real stated that he would look into the possibility that improper use of confidential probation materials had been used in the bankruptcy case. I was present for the entire meeting on January 24, 2000.

8. I have reviewed my file in the *Canter* case and my notes show that on February 3, 2000, I met with Ms. Canter in connection with her probation status and she informed me that she had followed Judge Real's instruction to advise her attorney, Guy Iverson, of her bankruptcy case complaint.

9. On April 3, 2000, I once again met with Ms. Canter and she informed me that it was her understanding, based upon information she had received from Mr. Iverson, that Judge Real had assumed jurisdiction over her bankruptcy case.

10. I recall having been subsequently advised by Judge Real's staff that a previously scheduled 120-day meeting on April 24, 2000 would not take place in that Judge Real had taken jurisdiction over Ms. Canter's bankruptcy case and there was a need to avoid even a perception of a conflict.

11. In June of 2002, I was transferred to the Inglewood Division of the U.S. Probation Office and no longer have supervision of Ms. Canter's case.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

DATED: August 5, 2004

RANDALL LIMBACH

EXHIBIT F

DECLARATION OF LOYETTE LYNN FISHER

I, LOYETTE LYNN FISHER, declare as follows:

1. I have been employed either as a Courtroom Deputy Clerk or Administrative Assistant to Judge Manuel L. Real for the last twenty-four years. Part of my responsibilities as Judge Real's Administrative Assistant is to receive correspondence and mail delivered to Judge Real's Chambers and to appropriately file these documents.

2. I have personal knowledge of the facts set forth in this declaration, and, if called upon to testify, I could and would competently testify thereto.

3. In 1976, Judge Real instituted his "120 Day Program" for defendants who were sentenced to probation. The program was designed to help probationers become productive and law abiding citizens. The program is administered through the Probation Office. I receive a list of probationers that are scheduled for the 120 day program each month. The probation officer submits a report that details how the probationer is doing in their performance of community service, work, restitution and any problems with the probationer. I call the names of the probationers in the courtroom and escort them with their probation officer into Judge Real's chambers for the meeting. During the meeting Judge Real counsels the probationer with respect to problems they may have encountered, monitors the probationer's progress and lends encouragement to complete the program. More than four hundred probationers have successfully completed Judge Real's 120 Day Program. It is my belief that this program has been of great value to the probationers and to the community in general.

4. On or about December 22, 2003, I reviewed an order from the Judicial Council involving the case of *United States v. Deborah Canter*. I carefully reviewed the file concerning Ms. Canter, which I maintain as

EXHIBIT F

Judge Real's Administrative Assistant. After conducting a diligent search of the file, I found no letter or other written communication from Deborah Canter to Judge Real. Nor do I recall ever having received or seen any letter from Ms. Canter to Judge Real during the time I have been employed as Judge Real's Administrative Assistant.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

DATED: August 6, 2004

LOYETTE LYNN FISHER

EXHIBIT G

JUDICIAL COUNCIL

FOR THE NINTH CIRCUIT

In re Charge of	No.03-89037
	SUPPLEMENTAL
	ORDER AND
Judicial Misconduct	MEMORANDUM

Before: SCHROEDER, Chief Judge

A complaint of misconduct has been filed against a district judge of this circuit. Administrative consideration of such complaints is governed by the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules), issued pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C. §§ 351-364.

In February 2003 complainant, an attorney who was not a party and did not represent a party in the relevant litigation, submitted a misconduct complaint alleging that the judge in question had acted for inappropriate personal reasons in placing an attractive female criminal defendant on probation "to himself, personally," and that the judge's actions in withdrawing that defendant's bankruptcy matter from the bankruptcy court and staying enforcement of a state unlawful detainer judgment against her further supported complainant's allegation of improper conduct.

EXHIBIT G

Before entering an Order, the Chief Judge conducted an inquiry into the charges, and specifically the allegation that there was an inappropriate personal relationship between the judge and the defendant/debtor. In the course of that inquiry, the Probation Office confirmed that all meetings that took place between the judge and the defendant were regularly scheduled, were documented in Probation Office files, and included a probation officer in attendance at all times. The Probation Office and the Clerk's Office further confirmed that the defendant was the subject of a formal probation/commitment order, and that it was the custom of the judge to hold periodic status meetings with probationers and their probation officers.

In a Dismissal Order and Memorandum filed on July 14, 2003, the Chief Judge noted that the Court of Appeals had already reviewed the case in which withdrawal of bankruptcy jurisdiction had occurred; the court had held that the withdrawal had been improper, and had remanded the case to Bankruptcy Court. This complaint was therefore related to the merits of a prior appeal. The Chief Judge observed that misconduct complaints relating to the merits of a judicial decision are not cognizable under the misconduct statute and the circuit's rules, and that such merits determinations are reserved for appellate review. In this instance appellate review had already occurred. The Chief Judge further stated that her inquiry had not substantiated the

conclusory charges of any inappropriate personal relationship between the judge and the defendant/debtor. Accordingly, in the July 14, 2003 Order, the Chief Judge dismissed the complaint in its entirety, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii), and Misconduct Rules 4(c)(1)and (c)(3).

Complainant petitioned for review by the Judicial Council. The Judicial Council then apparently made some further inquiry. By a divided vote, on December 18, 2003, the Judicial Council issued an Order vacating the Chief Judge's Dismissal Order and remanding the matter to the Chief Judge for further proceedings consistent with its Order. The council's Order stated that "In response to an inquiry from our council, the debtor's bankruptcy attorney claimed that, unbeknownst to him, his secretary had drafted a letter from the debtor to the district judge, asking for his help in preventing her eviction. According to the secretary, the letter was delivered by the debtor 'a day or two before . . . [the district judge] withdrew the [bankruptcy] reference,' and the next time they saw each other, the debtor told her 'the letter had worked.'" The Judicial Council noted that this information was based on hearsay, but asked that it be investigated further. The Order expressed concern that the district judge might have exercised judicial power based on "secret communications," and a further concern that he assigned the case to himself for the express purpose of granting the debtor

relief in a matter unrelated to the criminal case assigned to him.

The Judicial Council focused on the ex parte nature of communications between the judge and the defendant/debtor and viewed the new information about a letter to be more serious than either the information considered by the panel that heard the prior appeal or the communications previously considered by the Chief Judge. Therefore, the Judicial Council remanded the misconduct complaint for further inquiry by the Chief Judge.

Accordingly, the Chief Judge directed that a further inquiry be conducted. That inquiry has now been concluded. In connection therewith additional information, including sworn declarations and other documentary evidence, was obtained.

The council's inquiry had included hearsay information from the debtor's former attorney and his secretary/wife concerning a letter prepared by the debtor and personally delivered by her to the judge. In the course of the Chief Judge's subsequent inquiry, the debtor and the judge, each of whom would have first-hand knowledge of such delivery, firmly denied that any such letter was written or delivered. No such document was found in the court's records, and both the debtor and the judge also firmly denied that any meetings or communications outside of the scheduled status meetings with a probation officer in attendance took place. The debtor further denied, under penalty of perjury,

that she had any conversation with her former attorney's secretary/wife in which the debtor stated either that she had delivered a letter to the judge or that "the letter had worked." Because the district judge, his staff, and the debtor all certified that the "letter" and "visit" mentioned in the hearsay account previously reported to the Judicial Council did not exist or happen, there is no basis for a finding that credible evidence exists of a letter or other "secret communication" having passed between the defendant/debtor and the district judge. There is similarly no basis for finding that there was any private meeting or discussion between them at any time.

Furthermore, with respect to the withdrawal of bankruptcy jurisdiction itself, two material points have been considered that were not addressed before the Judicial Council. The first relates to the district judge's reason for withdrawal of the bankruptcy reference. In a supplemental statement the district judge wrote that he had been made aware that the defendant/debtor's pre-sentence report had been unlawfully filed and/or referred to in Bankruptcy Court and in state court proceedings. In response to the Chief Judge's inquiry, he stated that he withdrew the bankruptcy reference in light of that knowledge. Withdrawal for the purpose of preventing further violations of confidentiality and conducting contempt proceedings constitutes, at the least, an "arguably legitimate basis" for such

action.

Second, the district judge himself recognized the questionable nature of his intervention in the bankruptcy case and, pursuant to the court's internal procedures, asked another district judge to review the record. Following the voluntary transfer of the bankruptcy case to a disinterested judge in his district for independent review, that judge granted a motion to return the case to bankruptcy court. This transfer occurred several months before the matter was argued in the Court of Appeals. For reasons that are not clear, the appellate panel apparently was unaware that at the time of oral argument on the propriety of withdrawal of the bankruptcy reference, the case had long since been returned to Bankruptcy Court and closed by the assigned bankruptcy judge.

Having considered all of the evidence in this matter, it is apparent that complainant's factual allegations of an inappropriate personal relationship, and the Judicial Council's subsequent concern about secret communications having occurred between the district judge and the defendant/debtor, are not reasonably in dispute within the meaning of 28 U.S.C. § 352(a). Furthermore, the unlawful filing of and references to a confidential pre-sentence report in defendant/debtor's bankruptcy proceedings constituted a legitimate basis for the district judge's initial assumption of jurisdiction in the bankruptcy case,

sufficient to preclude a finding of judicial misconduct.

Accordingly, for the reasons expressed herein, the complaint is dismissed.

COMPLAINT DISMISSED.

William M. Schmedlin
Chief Judge

EXHIBIT H

they may have or discover claims against the other which are unknown or unanticipated by them. Nevertheless, the Parties hereby expressly waive all rights they may have with respect to such unknown claims or damages.

DHX further represents and warrants that it is the sole owner of all of the respective claims hereby released by it and agrees to hold harmless and indemnify all parties released herein from and against all liability, damage, costs and expense, including attorneys fees, as a result of any claim asserted or brought, whether litigation is commenced or not, by any person or entity who claims an interest in the released claims.

The Parties acknowledge and agree that any rule of interpretation, to the effect that ambiguities are to be resolved against the drafting party, shall not apply to the interpretation of this Agreement.

This Agreement shall be construed according to and governed by English law. Further, in any action to enforce the terms of this Agreement, the prevailing party or parties shall be entitled to recover reasonable attorneys' fees, experts' fees and costs in connection with such action.

This Agreement constitutes the entire agreement between Parties pertaining to the subject matter hereof, and may be modified only by a written agreement signed by all Parties hereto. This Agreement may be executed in counterparts, each of which shall be deemed to be an original.

The signatures below further represent that they have authority to execute this release on behalf of the respective parties.

Date: 3/15/04 DHX, Inc.
By: _____ /s/ _____
Its: President

Date: 16/3/04 AGF M.A.T., S.A.
By: _____ /s/ _____
P. Warren / Allianz Marine & Aviation
Its: Authorized Agent

Date: 16/3/04 Allianz AGF MAT, Ltd.
By: _____ /s/ _____
P. Warren / Allianz Marine & Aviation
Its: Authorized Agent

APPROVED:

Date: March 15, 2004 _____ /s/ _____
DAVID E.R. WOOLLEY

Date: _____ GIBSON ROBB & LINDH LLP
G. GEOFFREY ROBB

Counsel

David E.R. Woolley, Los Angeles, California, for plaintiff-appellant-cross-appellee.

G. Geoffrey Robb, Gibson Robb & Lindh LLP, San Francisco, California, for defendant-appellee-cross-appellant.

In re COMPLAINT OF JUDICIAL MISCONDUCT.

No. 03–89037.

Judicial Council of the Ninth Circuit.

Sept. 29, 2005.

Background: Misconduct complaint was filed against a district judge. After the Chief Judge dismissed the complaint, complainant petitioned for review.

Holdings: The Judicial Council of the Ninth Circuit held that:

(1) judge did not commit misconduct by ordering female probationer to appear before himself personally, and

(2) adequate corrective action was taken in response to any inappropriate conduct occurring when district judge withdrew reference in female probationer's bankruptcy proceeding and stayed eviction proceedings against the probationer.

EXHIBIT H

Affirmed.

Ezra, Chief District Judge, filed opinion concurring in part and dissenting in part.

Kozinski, Circuit Judge, filed dissenting opinion.

Winmill, District Judge, filed dissenting opinion.

1. Judges ⇐11(2)

District judge did not commit misconduct by ordering female probationer to appear before himself personally, where judge had for many years directed both male and female probationers to appear before him personally during their probationary period, and in all cases, such personal meetings were in the company of the probation officer.

2. Judges ⇐11(2)

Adequate corrective action was taken in response to any inappropriate conduct occurring when district judge withdrew reference in female probationer's bankruptcy proceeding and stayed eviction proceedings against the probationer based on information he allegedly learned from probationer during personal meeting with her in her criminal case; in response to Judicial Council's request for acknowledgment of "improper conduct" and a "pledge not to repeat it," judge acknowledged that he could have prevented misunderstandings by the parties if he had articulated reasons for his actions and that a similar situation would not occur in the future.

3. Judges ⇐11(1)

Overall purpose of the Judicial Conduct and Disability Act is not to punish but to protect the judicial system and the public from further acts by a judicial officer that are detrimental to the fair administration of justice. 28 U.S.C.A. § 372.

Before: ALARCÓN, KOZINSKI, KLEINFELD, McKEOWN and W. FLETCHER, Circuit Judges, and EZRA, LEVI, McNAMEE, STRAND and WINMILL, District Judges.

ORDER

A misconduct complaint was filed against a district judge of this circuit pursuant to 28 U.S.C. § 372(c) (now 28 U.S.C. § 351(a)) in February 2003. The Chief Judge entered an Order and Memorandum dismissing the complaint on July 14, 2003. The Judicial Council entered an Order vacating and remanding to the Chief Judge for further proceedings on December 18, 2003. After further investigation, the Chief Judge entered a Supplemental Order and Memorandum on November 4, 2004, again dismissing the complaint. Complainant has filed a petition for review of the Chief Judge's November 4th Order.

Complainant alleges that the district judge acted for inappropriate personal reasons in placing a "comely" female criminal defendant on probation "to himself, personally," and in withdrawing the reference in the bankruptcy proceeding of this probationer in order to "benefit an attractive female." The claim asserted in the complaint is that the judge "acted inappropriately to benefit an attractive female" and requested that "this matter be appropriately investigated to determine, among other things, the actual relationship" between the probationer and the judge. An investigation was made of the allegation.

[1] Complainant's suggestion of an inappropriate personal relationship with the probationer is entirely unfounded. This district judge has for many years directed criminal probationers, both male and female, to appear before him personally during their probationary period. In all cases, the district judge's personal meeting with the probationer is in the company of

the probation officer. The probationer in this case was supervised in the same manner as other probationers supervised by this district judge, as described in an affidavit by her probation officer.[1]

[2] The withdrawal of the reference by the district judge was dealt with by the court of appeals in *In re Canter*, 299 F.3d 1150 (9th Cir.2002). The court held that the district judge had abused his discretion in withdrawing the reference and in staying eviction proceedings against the probationer.

The district judge withdrew the reference on February 17, 2000, and stayed the eviction proceedings on February 29. While evaluating the misconduct complaint now before us, the Chief Judge learned that in July 2001 the district judge transferred the bankruptcy proceeding to another district judge to allow the second judge to evaluate the propriety of the withdrawal of the reference. The second judge re-referred the proceeding to the bankruptcy court in September 2001. The bankruptcy court granted the trustee's motion to abandon the estate's interest in the residence in question in January 2002.

The Judicial Council's remand to the Chief Judge indicated concern that the district judge may have received an improper ex parte letter from the probationer, and that the withdrawal of the reference may have been based on information contained in the alleged letter. After an investigation, the Chief Judge found that no such letter had been transmitted to, or received by, the district judge. We will not upset that factual finding. Further, any other impropriety in the district judge's receipt of information from the probationer during his personal meeting with her, and in the withdrawal of the reference based on that information, has been the subject of appropriate corrective action by the court of appeals, which held that there had been an abuse of discretion, and by the district judge's own earlier action in transferring the bankruptcy proceeding to another district judge.

On May 18, 2005 the Judicial Council communicated with the district judge setting forth with specificity the nature of the inappropriate conduct that he had engaged in relating to the withdrawal of the reference of the Canter bankruptcy and setting forth the necessity for appropriate and sufficient corrective action including an acknowledgment by the district judge of his "improper conduct" and a "pledge not to repeat it."

In response to the Judicial Council's communication, the district judge, in a written response from his lawyers, advised that, "... he has carefully reflected upon the underlying events surrounding this proceeding. Upon reflection, he recognizes that if he had articulated his reasons for withdrawing the reference and re-imposing the stay, and his underlying concerns that led to those actions, misunderstandings by the parties could have been prevented. As would any dedicated jurist, he believes those types of misunderstandings should be avoided wherever possible, and he recognizes that it was unfortunate they occurred in this situation. He does not believe that any similar situation will occur in the future."

[3] We are satisfied that adequate corrective action has been taken such that

1. The court's supervision of a probationer does not involve additional parties or require adversary legal proceedings unless the probation officer asks the court to revoke probation because of an alleged violation of a condition of probation. The conditions of probation, and, therefore, the supervision of a probationer, often focus on the probationer's living arrangements and economic circumstances. *See* 18 U.S.C. § 3563(a)(7), (b)(1), (b)(2), (b)(13), and (b)(19).

there will be no re-occurrence of any conduct that could be characterized as inappropriate. In response to the dissents, it is important to note that the overall purpose of the Judicial Conduct and Disability Act is not to punish but to protect the judicial system and the public from further acts by a judicial officer that are detrimental to the fair administration of justice. *See Rule 1 of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability* ("The law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts."). As the procedural history of this complaint amply demonstrates, the Council has given close and diligent attention to this matter over a period of many months. Although the specific allegation raised by the complainant of judicial action in exchange for sexual favors is as straightforward as it is without merit, the additional issues that have been raised along the way in the course of the Council's inquiry are factually and legally complex. It is not surprising that all members of the Council do not agree on the correct resolution of these issues. Indeed, it is even a fair question whether these additional matters are properly within the scope of the complaint. Assuming that they are, the Council's finding of corrective action is a considered judgment, based on the circumstances of this case, that is specifically authorized by the rules that govern these proceedings. *See Rule 14(d).* A finding of corrective action is not a cover up or a whitewash; it is a finding that adequate steps have been taken to assure that the conduct will not be repeated, whether or not the conduct crosses over the line from inappropriate conduct to misconduct.

Judge Kozinski suggests that the Council's goal is to avoid "hurting the feelings of the judge" who is the subject of the complaint. Dissent at 1883. Not so. Our goal in these proceedings is to maintain the integrity of the judiciary, not to cater to hurt feelings. Compared to many of the decisions we are called upon to make, decisions on misconduct complaints do not make any special claim on a judge's intellectual integrity or personal courage. Any judge who feels that his or her impartiality might be affected because of a personal relationship to the judge about whom a complaint is made must recuse. Otherwise, it is our duty to consider the complaints objectively, without bias for or against the judge or the complainant. This is not an onerous duty, and we gladly accept it.

The Judicial Council finds that appropriate corrective action has been taken in this case and we therefore AFFIRM the November 4, 2004, Order of the Chief Judge dismissing the complaint.

EZRA, Chief District Judge, partially concurring and partially dissenting:

This complaint of misconduct is a complex and difficult one that it is exacerbated by the unproven, and as far as I can discern from the record unfounded, insinuation of licentious conduct on the part of the District Judge with respect to his dealings with Ms. Canter. With respect to those allegations of personal misconduct I join with both the majority and Judge Winmill's dissent and would affirm the Chief Judge's dismissal of that portion of the complaint as well as the allegations surrounding the so called letter.

However, in my view the record is insufficient with regard to the remainder of the complaint and I therefore regretfully cannot join the majority in affirming the Chief Judge's disposition of the remaining allegations. I would remand to the Chief Judge for further proceedings in order to allow the record to be more fully devel-

oped with respect to the bankruptcy stay ordered by the District Judge and the District Judge's motivation behind it.

I wish to make it clear that by this partial dissent I am not suggesting a finding of misconduct should be made. It is my view that given the serious nature of the allegations and the points made by both the majority and the two dissents that further fact finding with appropriate input from those implicated needs to be undertaken before a conclusion either way can be reached under our standard of review.

KOZINSKI, Circuit Judge, dissenting:

Passing judgment on our colleagues is a grave responsibility entrusted to us only recently. In the late 1970s, Congress became concerned that Article III judges were, effectively, beyond discipline because the impeachment process is so cumbersome that it's seldom used. *See* 126 *Cong. Rec.* S28091 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini). At the same time, Congress was aware of the adverse effects on judicial independence if federal judges could be disciplined by another branch of government using means short of impeachment. *See* S.Rep. No. 96-362, at 6 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4320. The compromise reached was to authorize federal judges to discipline each other. *See* 126 *Cong. Rec.* S28091. We are unique among American judges in that we have no public members—lawyers or lay people—on our disciplinary boards. *See* American Judicature Society, *Appendix C: Commission Membership, at* http://www.ajs.org/ethics/pdfs/Commission%20membership.pdf (revised Aug. 2003) (listing disciplinary procedures for all state judges). Rather, judicial discipline is the responsibility of the circuit judicial councils—bodies comprised entirely of Article III judges. *See* Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub.L. No. 96-458, 94 Stat.2035 (1980).

Disciplining our colleagues is a delicate and uncomfortable task, not merely because those accused of misconduct are often men and women we know and admire. It is also uncomfortable because we tend to empathize with the accused, whose conduct might not be all that different from what we have done—or been tempted to do—in a moment of weakness or thoughtlessness. And, of course, there is the nettlesome prospect of having to confront judges we've condemned when we see them at a judicial conference, committee meeting, judicial education program or some such event.

Pleasant or not, it's a responsibility we accept when we become members of the Judicial Council, and we must discharge it fully and fairly, without favor or rancor. If we don't live up to this responsibility, we may find that Congress—which does keep an eye on these matters, *see, e.g., Operations of Fed. Judicial Misconduct Statutes: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong. (2001); *Report of the Nat'l Comm'n on Judicial Discipline and Removal* (1993)—will have given the job to somebody else, materially weakening the independence of the federal judiciary.

For the reasons I explain below, I believe the judge who is the subject of the complaint in this case has committed serious misconduct by abusing his judicial power. *See* Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics*, § 2.07, at 50 (3d ed.2000)[hereinafter Shaman, Lubet & Alfini] ("Judges abuse the power of the judicial office when they abbreviate or change critical aspects of the adversary process in ways that run counter to the scheme established by relevant constitutional and statutory law.").

Some may disagree, as a majority of the Judicial Council apparently does. But I hope that, by the time I've finished writing, my reasons will be clear. To that end, I must do what the majority eschews—discuss the unusual and uncomfortable facts presented by the record before us.

Many of the facts are already public, having been discussed by the court of appeals in *In re Canter*, 299 F.3d 1150 (9th Cir.2002). *Canter* grew out of a bankruptcy case involving Deborah Canter who, at the time, was undergoing a messy divorce from her husband Gary. During their married life, the couple had lived in a house on Highland Avenue in Los Angeles; the house was owned by Gary's parents, who transferred title to the Canter Family Trust in 1997. Gary paid rent while he and Deborah were living there. When the couple separated in 1999, Gary moved out, leaving Deborah in possession; the rent payments stopped.

The Trust brought an unlawful-detainer action against Deborah seeking eviction and back rent, and the case was set for trial on October 26, 1999. Twenty-four minutes before trial was to start, Deborah filed a bankruptcy petition, which automatically stayed the unlawful-detainer case. *See* 11 U.S.C. § 362. Three months later, on January 26, 2000, the bankruptcy court lifted the automatic stay on a motion filed by the Trust. Deborah, represented by attorney Andrew Smyth, did not file an opposition. Thereafter, the Trust and Deborah—again represented by counsel—signed a stipulation. Based on that stipulation, the state unlawful-detainer court on February 7, 2000, ordered Deborah to vacate the Highland Avenue premises.

At that point, lightning struck. Without notice, without warning, without giving the Trust an opportunity to oppose, without so much as a motion, the district judge who is now the subject of this disciplinary complaint withdrew the case from the bankruptcy court. Twelve days later, the same judge entered a second order, enjoining the state-court judgment evicting Deborah. Like the withdrawal order, the injunction was not preceded by the usual processes to which we are accustomed in American courts, such as a petition from the party seeking the relief or a response from the opposing side. In fact, no one knew why the district judge had done what he did—the order gave no reasons, cited no authority, made no reference to a motion or other petition, imposed no bond, balanced no equities. The two orders were a raw exercise of judicial power, the net effect of which was to let Deborah Canter live in the Highland Avenue property rent-free. Just how raw this exercise of power was became clear—if it was not already—when the Trust twice asked the judge to lift the stay, and was twice met by summary denials.

The so-called hearing on the second of these motions gives a pretty good flavor of the judge's attitude in this matter. The motion (and an unrelated motion) were argued together on June 18, 2001—after Deborah Canter had occupied the property for some 15 months past the eviction judgment. Deborah was present (apparently pro se), but said nothing of substance. After counsel for the Trust soliloquized for about a page of transcript, we find the following unilluminating exchange:

THE COURT: Defendants' motion to dismiss is denied, and the motion for lifting of the stay is denied—I'm sorry. The motion to dismiss is granted with ten days to amend.

MR. KATZ: And the motion to lift the stay is denied?

THE COURT: Denied; that's right.

MR. KATZ: May I ask the reasons, your Honor?

THE COURT: Just because I said it, Counsel.

I could stop right here and have no trouble concluding that the judge committed misconduct. It is wrong and highly abusive for a judge to exercise his power without the normal procedures and trappings of the adversary system—a motion, an opportunity for the other side to respond, a statement of reasons for the decision, reliance on legal authority. These niceties of orderly procedure are not designed merely to ensure fairness to the litigants and a correct application of the law, though they surely serve those purposes as well. More fundamentally, they lend legitimacy to the judicial process by ensuring that judicial action is—and is seen to be—based on law, not the judge's caprice. The district judge surely had the *power* to enjoin enforcement of the state-court eviction judgment once he assumed jurisdiction over the bankruptcy case, but he could legitimately exercise that power only if he had sufficient legal cause to do so. Here, the judge gave no indication of why he did what he did, and stonewalled all the Trust's efforts to find out.

Nor is there anything in the record that would suggest a legal basis for the judge's action. Canter might have appealed the bankruptcy court's order lifting the stay, but she didn't. She might also have filed a motion asking the district court to withdraw the reference and enjoin the state-court judgment. Had she done so, we could have gleaned from her motion some legal theory supporting the injunction. But Canter didn't do that either, so we're left in the dark as to what legal basis the judge might have had for enjoining the state's lawful processes. Judicial action taken without any arguable legal basis—and without giving notice and an opportunity to be heard to the party adversely affected—is far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial to the effective and expeditious administration of the business of the courts." *See* 28 U.S.C. § 351(a); Shaman, Lubet & Alfini, *supra*, § 2.02, at 37 ("Serious legal error is more likely to amount to misconduct than a minor mistake. The sort of evaluation that measures the seriousness of legal error is admittedly somewhat subjective, but the courts seem to agree that legal error is egregious when judges deny individuals their basic or fundamental procedural rights."); *In re Quirk*, 705 So.2d 172, 178 (La.1997) ("A single instance of serious, egregious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct." (citing Jeffrey M. Shaman, *Judicial Ethics*, 2 Geo. J. Legal Ethics 1, 9 (1988))).

But, of course, there's more. Federal district judges don't withdraw the reference in bankruptcy cases for no reason, and they don't enjoin state-court judgments sua sponte unless they have some information about the case that persuades them to do so. Because the district judge had no prior involvement in the bankruptcy case, and no motion was filed challenging the propriety of the bankruptcy court's order lifting the automatic stay, we can infer that the judge learned about the case some other way. And, sure enough, Deborah Canter was no stranger to the district judge. At about the time she was involved in her divorce proceedings with Gary, Deborah was also the defendant in a criminal case where she was charged with false statements in violation of 18 U.S.C. § 1001, and loan fraud in violation of 18 U.S.C. § 1014. That case was pending before this district judge and he had placed Deborah on probation after she pled guilty to four counts.

When this complaint was before the Judicial Council on a prior occasion, we wrote the district judge and asked him whether the bankruptcy case was assigned to him by random assignment (a process known

as the "wheel") or in some other fashion. We also inquired as to his reasons for staying the state-court proceedings. This is what he said:

> There is no wheel for the purpose of withdrawing the reference in a bankruptcy matter.[1] I felt it was related to my program of working with probationers to help their rehabilitation. I have been doing this for more than 25 years and have been told by the Probation Officer that it is a successful program. *In this case a person who was a probationer in a criminal case informed me that the home in which she and her husband were living at the time of their divorce had been given to them by her husband's parents.* She was still living in the house with her 8 year old daughter and was in divorce proceedings. *She was contesting her right to occupancy in the divorce court and I felt it should be finalized there so I re-imposed the stay to allow the state matrimonial court to deal with her claim. From her explanation of the proceedings in the state court it appeared to me that her counsel had abandoned her interest so it could not be adequately presented to the state court.* Counsel for her husband had asked the Probation Officer to release Mrs. Cantor's [sic] probation report so it would be used in the divorce proceedings. I denied that request upon the recommendation of the Probation Officer.
>
> . . .
>
> I have no exact memory of any specific conversation with Mrs. Canter concerning the withdrawal of the reference in the bankruptcy matter. But what I can re-construct from the records I have in the criminal case is that *at a 120 day meeting with Mrs. Canter in connection with her performance of community service advised me that there was an unlawful detainer action pending in the Municipal Court to evict her from the property in which she and her minor daughter were living that was nominally owned by the senior Canters but was given to them when she married her then estranged husband.*
>
> I have that recollection because shortly after that meeting and my withdrawal of the reference in the bankruptcy case Mrs. Canter's lawyer *in the criminal matter* filed an application for an order to show cause to find counsel for Gary Canter in the matrimonial matter and counsel for Alan Canter (Gary's father) in the bankruptcy matter in contempt for filing a copy of Mrs. Canter's confidential probation report against her privacy interest in both courts, matrimonial and bankruptcy. After a hearing on the order to show cause it was discharged by stipulation of counsel to withdraw the probation reports although I never learned how the probation report got into the hands of counsel in the matrimonial or bankruptcy matter in the first instance. (Emphasis added.)

The district judge's response confirms what common sense suggests: His actions in sua sponte seizing control of the bankruptcy case and enjoining the state-court judgment were not random events; they were taken in direct response to communications he had with Deborah Canter—the

1. The district judge is correct, strictly speaking, in saying that "[t]here is no wheel for the purpose of withdrawing the reference in a bankruptcy matter," but only insofar as it applies to sua sponte withdrawals—withdrawals by the district court without a motion. According to the clerk of the district court, if a party files a motion seeking withdrawal of the reference, the case is assigned randomly according to the "wheel." Sua sponte withdrawals are very rare, so rare in fact that the district court clerk only "recalled one other instance of such withdrawal, so long ago that she could not remember the name of the judge, but she believed it was a judge who has long since retired."

bankruptcy debtor—during the course of supervising her criminal probation. As the judge admits, he formed certain impressions about the state-court proceedings based on Canter's representations to him, and concluded that possession of the Highland Avenue property should be "finalized" during the course of the matrimonial proceedings, so he enjoined the unlawful-detainer judgment.[2] In addition, he believed—again based entirely on what Canter told him—that "her counsel had abandoned her interest so it could not be adequately presented to the state court." The judge also suggested that maintaining her in possession of the Highland Avenue property would "help [her] rehabilitation."

The judge's explanation does not provide a lawful basis for his actions. He cites no statute, regulation or caselaw that authorized him, even arguably, to enjoin the state-court judgment. His belief that the debtor was badly served by her lawyer in the state-court proceedings, even if it were based on anything more than the debtor's unilateral complaint, provides no authority for exercising federal power under the Bankruptcy Act to interfere with the state-court judgment.[3] Nor does the judge's belief that the debtor's rehabilitation would be helped if she remained in the Highland Avenue property provide a lawful basis for the injunction. We so ruled in our previous order:

> The debtor, represented by her counsel, had stipulated to a judgment requiring her to vacate the premises, and the unlawful detainer court had entered the judgment. The district judge acted based on his belief that the dispute over possession of the property should be "finalized" in the divorce proceeding rather than the unlawful detainer proceeding, because "it appeared to ... [him] that her counsel had abandoned her interest so it could not be adequately presented to the state court." However, we are not aware of any authority for a bankruptcy court to determine whether parties in state court proceedings were adequately represented by their counsel. Nor are we aware of any authority allowing the district court to allocate jurisdiction between two state courts dealing with related subject matter.
>
> That the district judge believed his actions would help his probationer's rehabilitation is of no consequence. A judge may not use his authority in one case to help a party in an unrelated case. Exercise of judicial power in the absence of any arguably legitimate basis can amount to misconduct.

2. There is cause to doubt the district judge's explanation. *See* pp. 1196–97 *infra*. For present purposes, however, I accept it at face value.

3. As noted by the court of appeals in *In re Canter*, injunctions under the bankruptcy power may only be issued to protect the integrity of the bankruptcy estate:

> In staying enforcement of the municipal court judgment, the district court was acting pursuant to its powers under 11 U.S.C. § 105(a). Section 105(a) authorizes the district court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11]." *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 506 (9th Cir.2002). Section 105(a) "contemplates injunctive relief in precisely those instances where parties are pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate." *In re Baptist Med. Ctr. of N.Y.*, 80 B.R. 637, 641 (Bankr.E.D.N.Y.1987) (citations and internal quotation marks omitted).

In re Canter, 299 F.3d at 1155 (footnote omitted). There is plainly no authority to issue an injunction pursuant to section 105(a) for the purpose of providing the debtor a warm place to live at the expense of the creditors. Indeed, Congress has provided that a federal court may not enjoin a state-court judgment, unless specifically authorized by Congress or in aid of its jurisdiction. *See* 28 U.S.C. § 2283. The district judge's injunction was, thus, not merely unauthorized, it was unlawful.

Judicial Council Order (Dec. 18, 2003) at 5–6 (alterations in original). (For ease of reference, I attach a copy of our earlier order as an Appendix.)

The judge's response, moreover, adds a further dimension to his misconduct: His orders were not merely lacking in lawful authority, they were based on ex parte communications from the debtor for whose benefit those orders were entered. *See* Shaman, Lubet & Alfini, *supra*, § 5.01, at 160 ("At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation.... At worst, [it] is an invitation to improper influence if not outright corruption.").[4] By his own admission, the judge seized the case from the bankruptcy court so he could enter an injunction that would allow the debtor to remain in the Highland Avenue property. He did so based on information given to him by the debtor during the course of the criminal proceedings when the trustees and their lawyers were absent. In our earlier order we also ruled that this conduct was improper:

> The district judge's explanation confirms what complainant alleges and the evidence suggests: The district judge withdrew the reference in a bankruptcy case that was not previously assigned to him, and entered an order in that case based upon information he obtained ex parte from an individual who benefitted directly from that order.
>
> It is well established that a judge may not exercise judicial power based on secret communications from one of the parties to the dispute. *United States v. Thompson*, 827 F.2d 1254, 1258–59 (9th Cir.1987). The district judge did not, either before or after his ruling, disclose to the parties that this ex parte communication had taken place, its substance or the fact that it formed the basis of his ruling.
>
> While parties do not have a due process right to the random assignment of cases, a judge may not assign a case in order to affect its outcome. *See Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987). The judge here withdrew the reference and assigned the case to himself for the very purpose of granting the debtor relief from her imminent eviction.

Judicial Council Order (Dec. 18, 2003) at 4–5.[5]

4. "*Ex parte* communications are those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter." *Id.* § 5.01, at 159.

5. The majority claims that "it is ... a fair question whether these additional matters [other than the allegation of sexual impropriety] are properly within the scope of the complaint." Maj. at 1182. Fairness, like beauty, must be in the eye of the beholder. Our earlier order, remanding the case to the Chief Judge, dealt exclusively with these "additional matters." Were we just whistling in the wind? The Judicial Council has already construed the complaint as encompassing claims beyond sexual impropriety. It is unseemly for my colleagues to now call that considered judgment into question, and do so in a throwaway line with no explanation whatsoever. In any event, the suggestion that the complaint in this case was limited to "judicial action in exchange for sexual favors," *id.*, is preposterous. While the complaint makes reference to Canter as "an attractive female," there is no reference to sexual favors, nor to any quid pro quo. *See* n. 14 *infra*. Complainant clearly suggests that the judge may have been influenced by the debtor's appearance, but he expressly leaves open the nature of their relationship—a matter he suggests be investigated. The gravamen of the complaint is that the judge acted "inappropriately," a term that includes judicial acts based on ex parte communications and the related misconduct that is amply demonstrated by this record. Our duty is to read the complaint fully and fairly, construing the words the complainant actually uses rather than rewriting the complaint so it reads more narrowly than actually written. The standard the majority uses to construe the complaint here is very different from the standard we apply in normal civil litigation. *See, e.g., United States*

Before remanding the case to the Chief Judge, we ordered a limited investigation into the allegations of the complaint. This investigation was conducted, at the direction of the Judicial Council, by a staff person who called various individuals by telephone. This investigation uncovered evidence that there may have been further communications between the debtor and the district judge concerning her eviction. Among the individuals called by our staff was attorney Andrew Smyth, who represented Deborah Canter in the bankruptcy proceedings and also, apparently, in the state-court unlawful-detainer action. This is a summary of that conversation:

> Mr. Smyth said that when Deborah Canter filed in bankruptcy, she was being threatened with eviction by her in-laws and going through a nasty divorce. He was also aware that she was on probation and had regular appearances before [the district judge]. The Canter Family Trust moved for relief from the automatic stay in order to pursue its unlawful detainer action in state court, and Mr. Smyth stipulated to an order. He speculated that Ms. Canter may have lost some trust in him after that, but said that he believed that all of her defenses could best be raised in the state court action. He said he was surprised when [the district judge] withdrew the bankruptcy reference and reimposed the stay. At the time he had no idea why [the judge] had done so. He recalls that when the parties questioned [the judge] in court, [the judge] said "Because I said so." Mr. Smyth said that even at the time of the Court of Appeals argument, he and Mr. Katz were still speculating on the reason for [the judge's] action. Mr. Smyth said that he had "absolutely zero evidence" of any improper relationship between [the judge] and Ms. Canter, but was "suspicious" because Ms. Canter was a "cute girl" who projected a "waif" persona that was appealing. At the time he thought that perhaps [the judge] had become aware of her divorce and imminent eviction in the course of one of her probation visits.
>
> Mr. Smyth then said that he had only become aware of the "real" reason for the withdrawal sometime after the Court of Appeals opinion. He explained that his wife and legal secretary Michelle, whom he described as a Korean emigre unfamiliar with the habits of American judges, told him that one day Ms. Canter had come into the office crying about her circumstances, and that Michelle had offered to help her to compose a letter to [the judge] and told her to go see him. Michelle did "ghostwrite" a letter for Ms. Canter explaining how her husband's family was picking on her and how she was being victimized in the divorce. I asked Mr. Smyth whether he knew if Ms. Canter actually delivered such a letter to [the judge], so he put his wife on the phone. She said that Ms. Canter told her that she had taken the letter in to [the judge]. It was Michelle's understanding that Ms. Canter delivered the letter to [the judge] personally and had some brief discussion with him. Ms. Canter told Michelle that the letter had "worked." I asked Michelle when this delivery took place, and she said she believed it was a day or two before [the judge] withdrew the reference.

v. LSL Biotechnologies, 379 F.3d 672, 683 (9th Cir.2004) ("[F]ederal complaints are generally construed liberally ...."); *Miranda v. Clark County*, 319 F.3d 465, 471 (9th Cir. 2003) (en banc); *Harmon v. Billings Bench Water Users Ass'n*, 765 F.2d 1464, 1467 (9th Cir.1985). I see no justification for applying a different standard here just because the respondent is a federal judge, and the majority offers none.

In our order remanding the case to the Chief Judge, we noted proof that the judge had withdrawn the reference and stayed the eviction "in response to a direct plea for help from the debtor," Judicial Council Order (Dec. 18, 2003) at 4, and suggested that the matter "be investigated further," *id.*

The Chief Judge, on remand, obtained denials of any such communication from the judge and from Deborah Canter. Based on these denials, the Chief Judge concluded that "there is no basis for a finding that credible evidence exists of a letter or other 'secret communication' having passed between the defendant/debtor and the district judge. There is similarly no basis for finding that there was any private meeting or discussion between them at any time." Chief Judge Order (Nov. 4, 2004) at 5.

The majority declines to "upset that factual finding," maj. at 1181, but the Chief Judge is not a trier of fact, and she did not conduct an evidentiary hearing. Her authority is limited to determining whether there is credible evidence of misconduct, and she may dismiss the complaint only if credible evidence is entirely lacking. *See* 9th Cir. Misconduct R. 4. That the judge accused of receiving a secret communication and the party who allegedly made the communication both deny it does not negate the fact that we have contrary evidence—the statement of the secretary who claims to have ghostwritten the letter for Deborah Canter and also claims that Canter told her she had delivered the letter and that "[it] had 'worked.'" [6]

The Chief Judge did not contact the lawyer or his secretary and they did not retract the statements they had made to our investigator. Nor can I imagine why they would have lied about this in the first place, as it hardly reflects creditably on their own conduct. At the very least, then, we have a conflict in the evidence that only an adversary hearing can resolve. And an adversary hearing can only be held if the Chief Judge convenes an investigative committee pursuant to Ninth Circuit Misconduct Rule 4(e), which she declined to do.

But there is more here than merely the conflicting statements; there is the matter of timing: According to probation office records and the judge's own statement, Canter and the district judge had a probation review meeting in his chambers on January 24, 2000. That was the last such meeting before the district judge withdrew the reference on February 17 and entered his order enjoining the unlawful-detainer judgment on February 29.[7] But, at the

6. The two denials are hardly as conclusive as the Chief Judge and the majority want to believe. The district judge made no statements to us at all. Rather, he answered some questions in a letter directed to his own lawyer and the lawyer then passed that information on to the Chief Judge. Neither the judge's statement nor, of course, that of his lawyer is under oath. *See also* pp. 1196–97 *infra* (questioning the veracity of other unsworn statements made to us by the district judge). As for Canter's statement, it is made under penalty of perjury but (as I note on p. 1191 below) says suspiciously more than it needs to. Moreover, the declarant had recently been convicted of felonies of deception. *See* Fed.R.Evid. 609(a)(2). She had also filed five bankruptcy petitions in just over seven years, three of which were dismissed within two months of filing. This is considered evidence of bad faith use of the automatic stay to stall legal proceedings against her. *See In re Knight Jewelry*, 168 B.R. 199, 202–03 (Bankr. W.D.Mo.1994). When she filed the last of these petitions—the one that is at the heart of our complaint—she signed, also under penalty of perjury, a form required by Local Rule 1015–2, which purported to list all her past bankruptcy petitions, yet she neglected to list any of the four prior petitions on that form. *See* Bankr.C.D. Cal. R. 1015–2.

7. The next such meeting was on April 7, 2000.

time of the January 24 meeting, the bankruptcy court had not yet lifted the automatic stay—that didn't happen until two days later, on January 26. Nor did the state court enter its order of eviction—the one the district judge eventually enjoined—until two weeks later, on February 7.

How then did the district judge know about the state-court eviction order that he eventually enjoined? Once the bankruptcy court lifted its stay, it was no longer concerned with the unlawful-detainer action and there is nothing in the bankruptcy court file reflecting the subsequent eviction judgment. Yet, the district judge was familiar enough with Deborah Canter's situation—including the specific judgment entered in state court two weeks after her probation meeting—that he was able to quash it with cruise-missile accuracy: "Pending further proceedings in this Court the judgment of February 7, 2000, in the matter of *ALAN S. CANTER v. DEBORAH MARISTINA ROMANO* in Municipal Court No. 99U18116 is stayed." Dist. Ct. Order (Feb. 29, 2000).

Normally, of course, there would be a motion, with declarations and exhibits attached, that would leave no doubt about how the judge learned the information on which he based his decision. But the record here is entirely silent. One plausible inference—perhaps the most likely inference—is that some time after the January 24 probation meeting, Deborah Canter communicated with the judge privately—by letter, by telephone or in person—and advised him that an eviction order had been entered against her, and that she would have to move out unless he did something about it lickety-split. The letter, allegedly ghostwritten by Smyth's secretary and delivered by Canter to the district judge, would seem to fit the bill.

But there is still a bit more to this story. Deborah Canter's declaration, in which she denies having written or delivered a letter to the judge, actually contains information not mentioned in the Chief Judge's order:

> 2. I was formerly represented by Andrew Smyth, Esq., in connection with bankruptcy proceedings. At one point in the proceedings I received a call at home from Mr. Smyth's wife and legal secretary, Michelle. She asked me to come in to the office to sign a declaration about an eviction action pending against me. I did so, and at Michelle's request I gave her $50 for an attorney's messenger service to deliver the declaration to the court. Michelle did not specify the addressee, and I do not have a copy of the declaration.
>
> 3. Approximately one week later, while I was at home, my mother told me that Mr. Smyth's office was on the phone. Mr. Smyth said that an eviction stay order had been issued.

The district judge enjoined enforcement of the state-court judgment on February 29. Approximately a week earlier would have been February 22. What then was this "declaration about an eviction action pending against me" that Canter says Smyth's secretary had her sign and sent off "to the court" by messenger? It's hard to imagine it had anything to do with the unlawful-detainer proceedings, because those were concluded on February 7 with the entry of the eviction judgment. The only case Canter had pending at that time that in any way pertained to her eviction was the bankruptcy, and the only document filed around that time was a motion dated February 25, seeking conversion from Chapter 13 to Chapter 7. Neither that motion nor Canter's attached declaration makes any reference to the eviction.

Could the "declaration" to which Canter refers in her sworn statement to us actually be the letter that the lawyer's secretary described in her conversation with our in-

vestigator? To be sure, the two accounts differ in material respects, but they also have much in common: a conversation between the secretary and Canter, a missive signed by Canter concerning the eviction that was then sent off to the court, an eventual happy result. Could it be that Deborah Canter did sign a letter as described by the secretary? Could Canter be worried that such a letter might turn up, and is she providing herself an out by volunteering information about a declaration so she might later claim she didn't know what she was signing? This could explain why Canter included otherwise extraneous information in a declaration whose only purpose was to deny that she had any private communications with the district judge.

There might well be an innocent explanation for all this, but these are not the kind of details that a careful review of the record should overlook. In light of the other evidence we have as to a secret communication between the debtor and the district judge, leading up to his otherwise inexplicable order enjoining the state-court judgment, I cannot agree that the absence of such a communication has been conclusively established.

The majority, as did the Chief Judge before it, ignores these troubling issues and focuses instead on matters that are wholly irrelevant, such as the fact that the judge eventually transferred the case to another district judge, after suddenly developing doubts as to whether he had acted properly in seizing the case from the bankruptcy court. What the majority and the Chief Judge overlook is that the judge transferred the case *seventeen months* after he had removed it from the bankruptcy court, and just two days after the creditors had filed their mandamus petition with the court of appeals. Given that the district judge had developed no doubts whatsoever while maintaining the debtor in the Highland Avenue property for a year and a half, despite two motions by the Trust, this strikes me as a clumsy effort to avoid the inevitable dropping of the hammer by the court of appeals—an implicit acknowledgment of wrongdoing.[8]

Why does this matter, anyway? The district judge's misconduct occurred in

8. Worse, the Chief Judge suggests the fault really lies with the debtor's lawyers who bodwinked the court of appeals by pressing on with the mandamus petition even though the district judge had corrected his own mistake: "For reasons that are not clear, the appellate panel apparently was unaware that at the time of oral argument on the propriety of withdrawal of the bankruptcy reference, the case had long since been returned to Bankruptcy Court and closed by the assigned bankruptcy judge." Chief Judge Order (Nov. 4, 2004) at 6.

This is untrue, unfair and beside the point. One need only listen to the tape of oral argument before the court of appeals—freely available from the clerk of that court—to learn that the court of appeals panel was fully apprised of these events. But this made no difference to the relief requested by the mandamus petitioners because neither this district judge, nor the second district judge (who did, indeed, determine—as has everyone else—that the first judge had no basis for withdrawing the case from the bankruptcy court), bothered to vacate the order enjoining the state-court judgment. The case was thus returned to the bankruptcy court with the injunction intact, and the bankruptcy judge—being lower on the food chain than the district judge—reasonably felt he had no authority to vacate that order. At the time of oral argument in the court of appeals, in March 2002, counsel for the creditors represented that his clients continued to feel bound by the injunction, and reminded the court that "Ms. Canter has now lived in my client's house for three years, rent free." The debtor's counsel agreed that the district judge's order continued to "prevent any action against the debtor." Deborah Canter could not be dislodged from the Highland property until the court of appeals vacated the district court's order impeding the state-court eviction judgment.

The majority seems to be under the impression that the district judge's injunction was terminated in January 2002, when the bankruptcy court "granted the trustee's motion to

February 2000, when he seized the case from the bankruptcy court based on information whispered to him by the debtor ex parte, and then stayed her eviction without a stated reason and without first giving the parties aggrieved by the order a chance to argue against it. It occurred again when he denied their two motions for reconsideration with the imperious "Just because I said it, Counsel" as the only reason. *See* p. 1184 *supra*. Had he vacated his order at a later date, this might have mitigated the harm caused by his misconduct, though it could not have undone the misconduct itself. But he didn't even do that much. With the help of another district judge hand-picked by him, the case was trundled back to the bankruptcy court with the order enjoining the state-court judgment intact, and so it remained until the court of appeals issued its mandamus. How or why this series of events serves as "corrective action" for the district judge's misconduct, *see* maj. at 1181–82, is a mystery to me.[9]

Nor, of course, does the mandamus order of the court of appeals, which did find that the district judge had abused his discretion, count as corrective action. *See* maj. at 1181–82. The majority's contrary suggestion does an injustice to the many other district judges who have been reversed for abuse of discretion. When a court of appeals says that a district judge abused his discretion, this is a legal conclusion that connotes mere error—not wrongdoing. The court of appeals here carefully refrained from saying whether the district judge committed misconduct, mindful no doubt that such determinations are the province of this body. Merely reversing an erroneous judgment that is the product of misconduct does not undo the misconduct. If my colleagues need a clear-cut hypothetical to demonstrate this self-evident proposition, consider a judgment procured by a bribe. That the court of appeals reverses the judgment—which it would do in every instance where the bribe was brought to its attention—does not and cannot insulate the district judge from the consequences of his misconduct on the theory that the misconduct has somehow been cured. *See* Shaman, Lubet & Alfini, *supra*, § 2.02, at 36 ("In some instances ... legal error may amount to judicial misconduct calling for sanctions ranging from admonishment to removal from office."); *accord Oberholzer v. Comm'n on Judicial Performance*, 20 Cal.4th 371, 84 Cal. Rptr.2d 466, 975 P.2d 663, 679 (1999) (legal error "can constitute misconduct if it involves 'bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law or any purpose

abandon the estate's interest in the residence in question." Maj. at 1181. If that is what my colleagues are saying—and I can see no other point in mentioning that event—they are simply mistaken. Termination of the bankruptcy proceedings had no effect on the district court's injunction and the creditors were still precluded from enforcing the state-court judgment, even though the debtor had abandoned any interest in the property, until the court of appeals vacated the injunction seven months later.

9. The Chief Judge also seems to say in her order that the judge's actions were justified by the fact that a copy of the debtor's presentence report had been improperly released and relied upon in the bankruptcy proceedings. Chief Judge Order (Nov. 4, 2004) at 5. The majority doesn't adopt this rationale and for good reason: It is manifestly untrue. The district-court docket in the bankruptcy case reflects no proceedings whatsoever related to the presentence report. In his written statement to us, the district judge admitted that a show-cause order *was* issued to deal with this issue, but in the criminal case. *See* p. 1186 *supra*. The docket in the criminal case confirms this. There was absolutely nothing about the improper release of the presentence report that justified withdrawing the reference in the bankruptcy case, much less the entry of an order enjoining the state-court unlawful-detainer judgment.

other than the faithful discharge of judicial duty' " (citing cases)); *In re Quirk*, 705 So.2d at 178 ("egregious legal error, legal error motivated by bad faith, and a continuing pattern of legal error" can also constitute misconduct).

Finally, I find the district judge's slippery statement of contrition risible. As the majority notes, we wrote the district judge and offered to close the matter without further action, provided he acknowledge his "improper conduct" and "pledge not to repeat it." *See* maj. at 1181.[10] This is consistent with the accepted practice of giving judges subject to a valid disciplinary complaint a chance to mitigate or correct their misconduct by an open acknowledgment of wrongdoing, an apology and a pledge to mend their ways. *See, e.g., In re Charges of Judicial Misconduct*, 404 F.3d 688, 700 (Judicial Council of the 2d Cir. 2005).

The district judge's response here falls far short of what I would consider corrective action. First of all, he fails to even acknowledge that he acted based on information he obtained from the party benefitted by his orders, without disclosing this to the opposing parties or giving them an opportunity to correct any misstatements or exaggerations that may have been made to him in private. Our rules governing judicial misconduct proceedings use this precise example of conduct that is sanctionable: " 'Conduct prejudicial to the effective and expeditious administration of the business of the courts' ... includes such things as ... improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office." 9th Cir. Misconduct R. 1(c); *see also* 28 U.S.C. § 351(a); Code of Conduct for United States Judges, Canon 3(A)(4).

Second, the judge withdrew the bankruptcy reference without any legal justification, for no reason other than to benefit the debtor by blocking her eviction. *See id.*, Canon 3(C)(1)(a) (judges should not participate in cases "in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which ... the judge has a personal bias or prejudice concerning a party"); *see also Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987) ("While a defendant has no right to any particular procedure for the selection of the judge ... he is entitled to have that decision made in a manner free from bias or the desire to influence the outcome of the proceedings.").

Third, he acted without notice, in direct contravention of Fed.R.Civ.P. 65(a)(1) which states in categorical terms, "No preliminary injunction shall be issued without notice to the adverse party."[11] Notice is also one of the bedrock principles of due process and would be required even without the direct command of Rule 65(a). *See Joint Anti–Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–72, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Fourth, the district judge failed to heed the other explicit procedures applicable to

10. We also asked that the district judge tender an apology for his actions, a requirement the majority seems to have forgotten. Our letter said: "We believe that, in this case, the most appropriate corrective action would be for you to acknowledge your improper conduct, apologize for it and pledge not to repeat it."

11. It is clear that once an automatic bankruptcy stay is lifted, as happened in this case, it may not be re-imposed. Rather, the judge may act—if at all—only by issuing an injunction pursuant to section 105(a) of the Bankruptcy Code, in which case he must follow the procedures applicable to preliminary injunctions under Fed.R.Civ.P. 65. *See In re Canter*, 299 F.3d at 1155 & n. 1.

the issuance of an injunction, such as the requirements of a bond and a clear statement of reasons, *see* Fed.R.Civ.P. 65(c), (d), all of which are designed to provide transparency for purposes of appellate review and otherwise protect the interests of the party against which an injunction is entered. This was *twice* pointed out to the judge by the creditors in their motions for reconsideration, with no effect whatsoever. A federal courtroom is not Sherwood Forest; a judge may not take property from one party and give it to another, except by following established rules of procedure. *See* Shaman, Lubet & Alfini, *supra*, § 2.07, at 50 ("Judges abuse the power of the judicial office when they abbreviate or change critical aspects of the adversary process ... [and] have been disciplined for ... issuing dispositive orders without making findings of fact or setting forth reasons as required by law ....").

Fifth, the district judge acted without even colorable legal authority. To this day, I am unaware of any conceivable legal basis the district judge might have had for enjoining the state court judgment and keeping the debtor in the Highland Avenue property at the expense of the Trust. *See* p. 1187 n. 3 *supra*. Throughout these lengthy proceedings, the judge has offered nothing at all to justify his actions—not a case, not a statute, not a bankruptcy treatise, not a law review article, not a student note, not even a blawg. He's said nothing that would suggest he was mistaken—perhaps badly mistaken—but nevertheless acting in good faith. By his silence, the district judge has implicitly acknowledged that his orders were a raw exercise of power, unsupported by any authority other than that of his commission. *See* Shaman, Lubet & Alfini, *supra*, § 2.02, at 38 ("Intentional refusals to follow the law are another manifestation of unfitness for judicial office."). Congress has surely not made us the most powerful judges in the world so we can bestow thousands of dollars of bounties on our personal favorites whenever we feel like it.

Sixth, the district judge has failed to acknowledge the serious harm he caused the Trust through his improvident actions. Not only was it forced to host the debtor on its property rent-free for years—at a cost estimated by the court of appeals at $35,000—but it also had to spend money on lawyers to bring two motions for reconsideration and a mandamus petition in the court of appeals. Bankruptcy lawyers don't come cheap, and I'd be surprised if the legal costs associated with undoing the harm inflicted by the district judge didn't run into the tens of thousands of dollars. *See Miss. Comm'n on Judicial Performance v. Perdue*, 858 So.2d 85, 91 (Miss. 2003) (party aggrieved by judge's ex parte order incurred "attorneys fees in excess of $13,000.00").[12]

12. *Perdue* is a case remarkably like our own. The judge there granted a custody decree based on information provided to her ex parte. *Id.* at 92. Her order "stated no basis for jurisdiction," *id.*, was entered "without a petition being filed," *id.* at 91, and "there was no indication of any appearances, testimony, or evidence taken in the matter," *id.* at 92. Later, "when presented with a golden opportunity to right the wrong, Judge Perdue refused to even discuss the [matter]," *id.*, referred the case to another court, "thereby keeping in effect" her ex parte order, *id.* at 93, and "attempt[ed] to divert ... attention from her actions" by placing the blame on the aggrieved party, *id.* at 96. The Mississippi Supreme Court found it "especially troublesome" that the judge "fail[ed] to acknowledge her wrongdoing, or even that she may have made a mistake." *Id.* Based on these considerations, the court suspended the judge without pay for 30 days and assessed her the cost of the disciplinary proceedings. *Id.* at 98. The Mississippi Supreme Court's thorough and thoughtful opinion in *Perdue* contrasts favorably with the Judicial Council's summary order in our case.

Of all these things, the judge says nothing at all; he steadfastly refuses to admit any wrongdoing. What he seems to acknowledge—though it's hard to tell from his lawyer's guarded language—is that he should have communicated the reasons for his actions better, pretending that, had he done so, "misunderstandings by the parties could have been prevented." This is patently absurd. The problem at the root of the district court's actions lay in the fact that he *had* no reasons—at least no legitimate reasons—for doing what he did. What could he possibly have said that might have avoided "misunderstandings" by the Trust? Would the trustees have been placated had the judge told them that he had chatted with Deborah Canter in their absence and that, based on that conversation, he was convinced they had given her a raw deal? Any attempt on the judge's part to explain would only have made it clear that his orders lacked legal authority and were based on ex parte communications. The judge's failure to explain was not a foible; it was part and parcel of a calculated effort to maintain the debtor in the Highland Avenue property rent-free for as long as possible, and elude what he doubtless feared would be the adverse personal consequences of such an admission.

Nor does the judge's statement contain a pledge not to repeat his wrongful conduct. What he says, with uncharacteristic coyness, is that "[h]e does not believe that any similar situation will occur in the future." Perhaps he does not believe that any similar situation will occur because he doesn't expect to encounter a similar set of facts; it is hardly a commitment to act differently in similar circumstances. It reflects poorly on this body that, after asking the district judge for a pledge, my colleagues settle for something as binding and precise as a weather forecast.[13]

Worse still, my colleagues turn a blind eye to evidence that the accused judge may have been less than forthright in his communications with the Judicial Council. Recall that his explanation for issuing the injunction was that he thought Canter was "contesting her right to occupancy [of the Highland property] in the divorce court," and he "re-imposed the stay to allow the state matrimonial court to deal with her claim." *See* p. 1186 *supra*. In its second motion to have the injunction lifted, the Trust informed the district judge that the matrimonial court *had* by then adjudicated the issue, and had concluded that Canter had no rights in the property. Attached to the motion was the order of the state divorce court, entered after a five-day trial, which included the following finding: "The court finds that neither Petitioner [n]or Respondent have any ownership interest in the residence located at ... Highland Avenue, Los Angeles, California 90036, so therefore, there is no community property interest in said property under any theory of community property law."

Had the judge been motivated, as he now claims, by the desire to maintain the status quo until ownership of the property was resolved by the matrimonial court, one would think he would have rescinded his order once he learned that the matrimonial court had resolved the issue against the

13. The fact that the judge does not speak to us directly, but in the third person through his lawyer, sheds further doubt on his sincerity. *Cf. In re Charges of Judicial Misconduct*, 404 F.3d at 691–92, 700 (complaints dismissed after judge writes his own letter of apology). I seriously doubt that many of my colleagues would be persuaded that a criminal defendant has accepted responsibility for his misconduct based on a statement from his lawyer that the defendant does not believe such a situation will arise again in the future. It does not inspire confidence in the federal judiciary when we treat our own so much better than we treat everyone else.

debtor. But no—nothing of the sort. What he did do was to summarily deny the motion and refuse to give reasons. *See* p. 1184 *supra*. By leaving the injunction in place after the debtor had been found to have no rights in the property, the judge enabled her to live there rent-free for another two years—until the court of appeals finally vacated the order by writ of mandamus. This sequence of events makes it perfectly clear that the judge was far more concerned with giving Deborah Canter a free place to live than with preserving any rights she may have had under state law.

The fact of the matter is that the judge's conduct here caused real harm. It certainly harmed innocent creditors to the tune of $50,000 or more. Worse, it harmed public confidence in the fair administration of justice in the courts of this circuit. The prohibition against ex parte communications, rules of procedure, principles of law—all of these are not trinkets that judges may discard whenever they become a nuisance. Rather, they are the mainstays of our judicial system, our guarantee to every litigant that we will administer justice, as our oath requires, "without respect to persons." 28 U.S.C. § 453.

"All of the foundations of judging—such as respect for the text of the law and precedent—reinforce the message of impartiality." M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J.App. Prac. & Process 45, 53 (2005). When a judge acts in accordance with the rules of procedure, when he gives reasons for his orders, when he allows both sides equal and open access to him, when he follows the law, he ensures not merely that justice is done, but that it appears to have been done. When, on the other hand, a federal judge exercises the vast powers entrusted to him by Congress based on secret communications with one party, when he fails to give the opposing side an opportunity to speak, when he refuses to give reasons for his actions, when he does not cite legal authority, when he stubbornly and laconically sticks to his guns despite repeated requests for reconsideration or an explanation, he inevitably gives rise to the suspicion that he acted for personal and improper reasons rather than according to the rule of law.

The complaint here brought this matter to our attention and plausibly suggested an inappropriate motive for the judge's actions. Complainant is surely not alone in his suspicions, as evidenced by this exchange in the argument before the court of appeals on the mandamus petition:

> JUDGE THOMAS: But you didn't ask for a reimposition of the stay or the injunction, right?
>
> MR. SMYTH: No. That is correct. I did not. It was a surprise he suddenly did.
>
> JUDGE THOMAS: Surprised you. And you have no explanation as you stand here today of why he did it.
>
> MR. SMYTH: No. Just a guess.
>
> JUDGE THOMAS: And what's your guess?
>
> MR. SMYTH: That he, one, he possibly felt my client was being ill served and that I so readily stipulated to lift the stay. He had had her as a client, not a client, a . . .
>
> JUDGE THOMAS: Defendant.
>
> MR. SMYTH: And she gives the kind of little girl lost, doesn't know what she's doing, she needs protection, everyone's picking on her, and I think he probably stepped in because his thought was that her lawyer wasn't doing a good [job], so I'll just preserve the status quo, let her have her stay. But again, I'm just trying to guess, you know counsel asked [the judge] why, and . . .

When opposing counsel was asked a similar question, his silence spoke more eloquently than any statement might have:

> JUDGE RAWLINSON: Counsel what is your speculation as to why the Judge sua sponte lifted, reimposed the stay?
>
> MR. KATZ: Judge Rawlinson, I would prefer not to answer that question.

A judge must not put himself in a position where the parties to the dispute suspect him of acting out of personal motives rather than according to law. By his unorthodox behavior in this case, the district judge did precisely that and I, for one, cannot say that these suspicions are unfounded.[14]

The majority claims that the issues raised by the dissenters "are factually and legally complex" and that it is therefore "not surprising that all members of the Council do not agree on the correct resolution of these issues." Maj. at 1182. Perhaps it's not surprising that we disagree, but I *do* find it surprising that I still don't know *why* we disagree, because the majority refuses to engage the issues. Complexity of the issues does not excuse a tribunal from confronting them. I also find it surprising that, despite what the majority claims is its "close and diligent attention to this matter over a period of many months," *id.*, my colleagues can't even figure out whether the judge's conduct "crosses over the line from inappropriate conduct to misconduct," *id.* A Judicial Council order in a misconduct case is not a jury verdict; the accused judge and the public are entitled to a decision that resolves the issues presented, no matter how difficult or complex they may be. Unfortunately, the majority's exiguous order seems far more concerned with not hurting the feelings of the judge in question. But our first duty as members of the Judicial Council is not to spare the feelings of judges accused of misconduct. It is to maintain public confidence in the judiciary by ensuring that substantial allegations of misconduct are dealt with forthrightly and appropriately. This the majority has failed to do.

14. My colleagues are too quick to dismiss complainant's suggestion of an improper relationship between the district judge and the debtor as "entirely unfounded," maj. at 1180, or even "scurrilous," Winmill dissent at 1202. Here is what complainant says, after pointing out that he had conducted "a little district court docket research" and discovered that Deborah Canter had been placed on probation by the district judge:

> It would appear to a reasonable observer who knew all these facts that something inappropriate happened here, beyond what the court [of appeals] discussed. What I mean to say is that it appears that [the district judge] acted inappropriately to benefit an attractive female whom he oddly had placed on probation to himself, and, if this occurred, then it would constitute extreme judicial misconduct.
>
> It is requested that this matter be appropriately investigated to determine, among other things, the actual relationship between Deborah Canter and [the judge].

This is no different from what her own lawyer told the court of appeals, *see* p. 1197 *supra*, or our investigator, *see* p. 1189 *supra*. Unfortunately, the judge's otherwise inexplicable actions invite such speculation. Whether the judge acted out of a misplaced sense of chivalry toward what he saw as a damsel in distress or for some other reason, I don't know. What I do know is that he did not act for judicially appropriate reasons and this alone justifies complainant's suggestion that the judge may have "acted inappropriately." I am well aware of the numerous misconduct complaints by disgruntled litigants who claim that they lost because the judge had some secret relationship with the prevailing party. Such complaints are routinely—and properly—dismissed by the Chief Judge because the accused judges followed normal procedures and there is no evidence whatsoever to support the allegations. This case is quite different because the district judge did *not* follow normal procedures and thus forfeited the presumption of regularity that normally attaches to judicial actions.

We are all human and do things we have reason to regret later. The transgression here, however, was particularly egregious and protracted, and despite numerous opportunities to do so, the district judge has steadfastly refused to own up to it. I therefore cannot agree either with the Chief Judge's conclusion that no misconduct occurred or the majority's conclusion that there has been sufficient corrective action to justify dismissal of the complaint. Rather, I believe that serious misconduct has been clearly established [15] and discipline must be imposed consisting of nothing less than a public reprimand and an order that the district judge compensate the Trust for the damage it suffered as a result of the judge's unlawful injunction.

I also believe that the aggrieved creditors are entitled to an apology from the judges of our circuit for the cost, grief and inconvenience they suffered in one of our courts because of the district judge's unprofessional behavior. The judge who committed the misconduct refuses to offer such an apology and it is therefore up to us. Because I cannot speak for the Judicial Council, a majority of whose members see far too little wrong with what the district judge here did, I offer mine.

Appendix: Judicial Council Order (Dec. 18, 2003)

JUDICIAL COUNCIL OF THE NINTH CIRCUIT

In re: COMPLAINT OF JUDICIAL MISCONDUCT

No. 03-89037

ORDER

Before: ALARCÓN, KOZINSKI, THOMAS, McKEOWN and W. FLETCHER, Circuit Judges, and PATEL, HUFF, COUGHENOUR, HATTER and SHANSTROM, District Judges.

A complaint of judicial misconduct was filed against a district judge of this circuit pursuant to 28 U.S.C. § 351-64. Complainant, an attorney who was not involved in the matters alleged in the complaint, claims that the district judge committed misconduct in the handling of a bankruptcy matter, which has been the subject of an adverse ruling by the Court of Appeals. *See In re Canter*, 299 F.3d 1150 (9th Cir. 2002). Specifically, complainant alleges that the district judge acted improperly in withdrawing the reference from the bankruptcy court and then re-imposing the automatic stay that the bankruptcy court had vacated on the motion of certain creditors. Re-imposition of the stay precluded the creditors from enforcing an unlawful-detainer judgment that would have entitled them to immediate possession of premises occupied by the debtor. The Chief Judge dismissed the complaint, noting that "[a] complaint will be dismissed if it is directly related to the merits of a judge's ruling or decision in the underlying case." Chief Judge Order at 2 (citing 28 U.S.C. § 352(b)(1)(a)(ii); 9th Cir. Misconduct R. 4(c)(1)).

While legal error alone will not amount to misconduct, the converse is not necessarily true: Misconduct can cause error. That a judge's ruling can be, or has been, subject to appellate review does not automatically insulate the judge's conduct from disciplinary proceedings. Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Ju-*

15. I reach this conclusion without taking into account the unresolved issue as to whether the debtor communicated with the judge via a secret letter after her January 24, 2000, probation review meeting. While I believe that issue deserves further investigation for the reasons I explain above, I agree with Judge Winmill that misconduct has been established based on the public record and the judge's own admissions.

Appendix: Judicial Council Order (Dec. 18, 2003)—Continued

dicial Conduct and Ethics § 2.02, at 36 (3d ed. 2000) ("In some instances ... legal error may amount to judicial misconduct calling for sanctions...."). If the misconduct claimed consists of nothing more than the judge's erroneous ruling, the complaint will be deemed to be "directly" related to the subject of the underlying proceeding, and must be dismissed summarily by the Chief Judge. However, where the complainant presents solid evidence that the judge's ruling was the result of "conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 351(a), then such underlying conduct will not be deemed "directly" related to the merits of the ruling and the Chief Judge must make an initial determination whether it amounts to misconduct. In so doing, she must bear in mind that "[t]he purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges engage in conduct that does not meet the standards expected of federal judicial officers." 9th Cir. Misconduct R. 1(a).

Complainant alleges, and the public record supports these allegations, that the district judge withdrew the reference from the bankruptcy court and re-imposed the stay without a motion from any party. The district judge gave no explanation for his actions, despite repeated inquiries from the aggrieved creditors. At the time of the bankruptcy proceeding, the debtor was on probation in a criminal case presided over by the district judge. The district judge had placed the debtor-defendant under his personal supervision, which means that he met with her and the probation officer personally at 120-day intervals. Probation office records indicate that there had been a meeting between the debtor, the probation officer and the district judge less than a month before the judge withdrew the case from the bankruptcy court. In response to an inquiry from our council, the debtor's bankruptcy attorney claimed that, unbeknownst to him, his secretary had drafted a letter from the debtor to the district judge, asking for his help in preventing her eviction. According to the secretary, the letter was delivered by the debtor "a day or two before ... [the district judge] withdrew the reference," and the next time they saw each other, the debtor told her "the letter had 'worked.'" Though this information is based on hearsay and should be investigated further, it suggests the district judge may have withdrawn the reference in response to a direct plea for help from the debtor.

In response to our inquiry, the district judge gives the following explanation:

> I felt ... [the bankruptcy case] was related to my program of working with probationers to help their rehabilitation. I have been doing this for more than 25 years and have been told by the Probation Officer that it is a successful program. In this case a person who was a probationer in a criminal case informed me that the home in which she and her husband were living at the time of their divorce had been given to them by her husband's parents. She was still living in the house with her 8 year old daughter and was in divorce proceedings. She was contesting her right to occupancy in the divorce court and I felt it should be finalized there so I re-imposed the stay to allow the state matrimonial court to deal with her claim. From her explanation of the proceedings in the state court it appeared to me that her counsel had abandoned her interest so it could not be adequately presented to the state court....
>
> ....

Appendix: Judicial Council Order (Dec. 18, 2003)—Continued

I have no exact memory of any specific conversation with ... [the debtor] concerning the withdrawal of the reference in the bankruptcy matter. But what I can re-construct from the records I have in the criminal case is that at a 120 day meeting with ... [the debtor] in connection with her performance of community service[, she] advised me that there was an unlawful detainer action pending in the Municipal Court to evict her from the property in which she and her minor daughter were living that was nominally owned by ... [the creditors] but was given to them when she married her then estranged husband.

The district judge's explanation confirms what complainant alleges and the evidence suggests: The district judge withdrew the reference in a bankruptcy case that was not previously assigned to him, and entered an order in that case based upon information he obtained ex parte from an individual who benefitted directly from that order.

It is well established that a judge may not exercise judicial power based on secret communications from one of the parties to the dispute. *United States v. Thompson*, 827 F.2d 1254, 1258–59 (9th Cir.1987). The district judge did not, either before or after his ruling, disclose to the parties that this ex parte communication had taken place, its substance or the fact that it formed the basis of his ruling.

While parties do not have a due process right to the random assignment of cases, a judge may not assign a case in order to affect its outcome. *See Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987). The judge here withdrew the reference and assigned the case to himself for the very purpose of granting the debtor relief from her imminent eviction. The debtor, represented by her counsel, had stipulated to a judgment requiring her to vacate the premises, and the unlawful-detainer court had entered the judgment. The district judge acted based on his belief that the dispute over possession of the property should be "finalized" in the divorce proceeding rather than the unlawful-detainer proceeding, because "it appeared to ... [him] that her counsel had abandoned her interest so it could not be adequately presented to the state court." However, we are not aware of any authority for a bankruptcy court to determine whether parties in state court proceedings were adequately represented by their counsel. Nor are we aware of any authority allowing the district court to allocate jurisdiction between two state courts dealing with related subject matter.

That the district judge believed his actions would help his probationer's rehabilitation is of no consequence. A judge may not use his authority in one case to help a party in an unrelated case. Exercise of judicial power in the absence of any arguably legitimate basis can amount to misconduct.

The line between abuse of discretion and misconduct is not always clear. It depends, rather, on the balancing of a variety of factors. *See* Shaman, *supra*, § 2.02. We need not decide whether that line was crossed in this case. We hold only that the Chief Judge erred in dismissing the complaint as frivolous or unsubstantiated; it is plainly neither. We therefore vacate the Chief Judge's dismissal order and remand to the Chief Judge for further proceedings consistent with our order.

Judges HUFF, COUGHENOUR, HATTER and SHANSTROM would affirm the order of dismissal.

Appendix: Judicial Council Order (Dec. 18, 2003)—Continued

WINMILL, District Judge, dissenting:

I agree with the majority opinion that we should affirm the Chief Judge's finding that the allegations of an inappropriate personal relationship are baseless. Indeed, the charges are not only baseless, but scurrilous and contemptible.

There remains, however, persuasive evidence of misconduct that has not been addressed by either the Chief Judge or the majority. The majority approaches this issue by finding that if any misconduct has been committed, it was corrected by (1) the finding in *Canter* that the district judge committed an abuse of discretion, *In re Canter*, 299 F.3d 1150, 1152 (9th Cir. 2002); (2) the district judge's referral of the case to another judge who ultimately sent the case back to the bankruptcy court, and (3) the district judge's apology.

I disagree with both the methodology of this approach and its conclusions. It is impossible to determine if misconduct has been corrected until the misconduct is precisely identified. Once the misconduct is identified in this case, it becomes clear that it has never been corrected.

The analysis must begin by asking whether there is misconduct. The complaint alleges that the district judge committed misconduct by enjoining the eviction of Ms. Canter on the basis of ex parte information without giving anyone notice or a chance to respond. The record supports this charge. In letters to the Council, the district judge himself explains that on the basis of ex parte information he received from Ms. Canter, he decided to benefit her by enjoining a state court judgment evicting her from the home in which she was residing. Ms. Canter did not own that residence, and the district judge gave the owners no notice and no opportunity to be heard. By staying the eviction, the district judge allowed Ms. Canter to occupy "the property rent-free for almost three years, resulting in a $35,000 loss of rental income." *Canter*, 299 F.3d at 1154.

Dispensing an ex parte favor without notice or an opportunity to be heard is "conduct prejudicial to the effective ... administration of the business of the courts." *See* 28 U.S.C. § 351(a); *see also Rule 14(f) of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability.* This phrase includes "improperly engaging in discussions with ... parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office." *Id. at Rule 1(c).* The district judge's conduct appears to fall precisely within this definition. His conduct also appears to violate Canon 3(a)(4) of the Code of Conduct for United States Judges, which directs judges to accord to the parties a "full right to be heard according to the law."

Of course, the Canons are only guidelines, and so not all violations of the Canons amount to misconduct. *In re Charge of Judicial Misconduct*, 62 F.3d 320 (9th Cir.1995). However, dispensing an ex parte favor, without giving anyone notice or an opportunity to be heard, goes beyond a disregard for guidelines, and strikes at the very heart of due process. It is not merely "prejudicial" but is outright destructive "to the effective administration of the business of the courts."

Once the misconduct is identified in this way, the three corrective actions identified by the majority can be seen in a different light. First, the finding in *Canter* that the district judge abused his discretion is a resolution of an appellant's legal claim, not an admonishment of a judge's conduct. Indeed, *Canter* never addressed in any way the misconduct issue before us.

Second, the district judge's referral to another judge for review did not occur until seventeen months had passed from the date the stay of eviction was entered. This action did nothing to correct the original misconduct of staying the eviction based upon an ex parte communication and without notice or an opportunity to be heard.

Finally, while it is commendable that the district judge apologized for failing to explain his actions, that apology misses the mark. The misconduct is not the failure to explain, but the granting of an ex parte favor without giving anyone notice or a chance to respond. The district judge has never apologized for that. Because the district judge's apology fails to address the misconduct, it cannot be deemed corrective action.

Judge Kozinski's dissent reveals in much more detail the powerful and persuasive evidence of misconduct in this case. Ultimately, however, I cannot join his dissent because the district judge has had no opportunity to provide a defense. While the district judge submitted letters in response to questions, he has never been given a full opportunity to present his defense.

Given that, we should invoke our authority under Rule 5 to "return the matter to the Chief Judge for further action," and direct the Chief Judge to use her authority under Rule 4(e) to appoint a Special Committee, constituted as provided in Rule 9, to resolve the issues raised here. Under Rule 11, the Special Committee has the authority to hold hearings where the district judge may put on a full defense, including witnesses if necessary.

The record in this case creates a stark appearance of misconduct. A further investigation is absolutely necessary, and therefore I cannot join in the majority opinion. At the same time, I cannot join in Judge Kozinski's dissent: If we rush to judgment, we deny to the district judge the very due process that he is accused of denying to others. By allowing the district judge a formal opportunity to respond to these very serious charges, we preserve his rights and confront the misconduct issue directly. For these reasons, I have filed this separate dissent.

CHARLOTTE'S OFFICE BOUTIQUE, INC., Petitioner–Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent–Appellee.

No. 04–71325.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 11, 2005.

Filed Oct. 7, 2005.

Background: Corporate taxpayer petitioned for review of IRS's determination that it was liable for unpaid employment taxes for its royalty payments to shareholder, as well as additions to tax. The Tax Court, 121 T.C. 89, 2003 WL 21783383, denied IRS's motion to dismiss, and, T.C. Memo. 2004-43, 2004 WL 350591, ruled in favor of IRS's proposed computation for additions to tax. Taxpayer appealed.

Holdings: The Court of Appeals, Callahan, Circuit Judge, held that:

(1) Tax Court had jurisdiction over all years included in notice of determination, regardless of IRS's concession

EXHIBIT I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF
ANUEL L. REAL
JUDGE

TELEPHONE:
894-5267

August 10, 2004

Don Smaltz, Esq.
Spiegel, Liao & Kagay
3323 Crownview Drive
Rancho Palos Verdes, California 90275

Dear Don:

You've asked me to respond in writing to the following questions with the understanding that my response would be included in a brief you will be filing on my behalf with Chief Judge Schroeder.

1. Did I ever receive any letter, or written communication of any sort from Ms. Maristina Canter or anyone acting for her concerning my intervening on her behalf to prevent her eviction?

The answer is NO. I have never received any letter or other document from Ms. Canter or any one acting on her behalf concerning her eviction other than pleadings filed in the bankruptcy proceeding which are a matter of public record.

2. Did I ever meet alone with Ms. Maristina Canter?

The answer is NO. I have never met alone with Ms. Canter at any time. The only time I ever met her was either in the presence of the probation officer assigned to her case, and in open court when she was present with her counsel.

EXHIBIT I

3. Is it my recollection that the events regarding a January 24, 2000, chambers meeting with Ms. Canter and her probation officer as recited at paragraph 7 of Probation Officer Limbach's declaration dated August 5, 2004, are accurate?

The answer is YES. I believe the events he states there are accurate, and they accord with my memory.

Cordially,

Manuel L. Real
United States District Judge

EXHIBIT J

DECLARATION OF ERIC L. DOBBERTEEN

I, Eric L. Dobberteen, hereby declare and state as follows:

1. I am a member of the State Bar of California, and a partner in Arnold & Porter LLP, counsel for Judge Manuel L. Real.

2. On July 24, 2006, I personally interviewed Michelle Yi Smyth in the presence of my colleague, Stephen Miller at the law offices of Andrew Smyth.

3. Michelle Smyth told us that she is married to Andrew Smyth, the former attorney for Deborah Canter. Michelle works for Andrew Smyth as a secretary.

4. We asked Michelle Smyth questions about a purported "letter" to Judge Real that she had allegedly typed on behalf of Deborah Canter.

5. Ms. Smyth told us that she had not typed a letter to Judge Real but instead had typed a declaration containing the title "Declaration of Deborah Canter," on twenty-eight line pleading paper that is used for court filings and the declaration was approximately two pages long.

6. Ms. Smyth recalled the declaration was not addressed to or directed to Judge Real. She said she has no recollection what month or year she typed this declaration, and that she did not have a copy in her files.

7. Ms. Smyth stated that the substance of the declaration included: Ms. Canter was cheated out of sufficient money for alimony and child support; that her husband had cheated her by not placing her name on the title after he promised he would do so; that Ms. Canter had been a housewife for years and needed time to prepare herself for the work place; and that her eviction should be delayed so that she could attend school and become more qualified for employment.

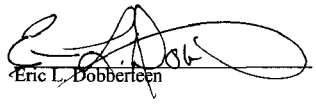
8. Ms. Smyth said Deborah Canter signed the document in her presence and that the declaration contained the usual "signed under penalty of perjury" statement found on court-filed declarations.

9. Ms. Smyth said that much later she told her husband of this event.

10. Mr. Miller and I also separately interviewed Mr. Andrew Smyth on July 24, 2006. During that interview Mr. Smyth told us that he did not believe there was any kind of improper relationship between Judge Real and Ms. Canter; that following Judge Real's withdrawal of the bankruptcy court reference, Smyth had discussed with Ms. Canter her relationship with Judge Real; and that she had denied any impropriety.

11. Mr. Smyth also told us that he recalled a telephone conversation with Ms. Canter's criminal attorney (Guy Iverson) during which call Mr. Iverson asked Mr. Smyth if he (Smyth) would file a pleading of some kind in the bankruptcy court regarding the use of the Pre-Sentence Report from Ms. Canter's criminal case. Mr. Smyth also told us that Mr. Iverson mentioned in this same call that he (Iverson) intended to file something in the criminal case about the improper use of the criminal case in the civil cases involving Ms. Canter.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed at Los Angeles, California on September 19, 2006.



Eric L. Dobberteen

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Mr. SMITH. Thank you, Judge Real.

I would like to ask you some questions about this subject of your dealings with Ms. Canter.

Prior to your withdrawal of the referral, how many times had you met with her or seen her, both in open court and in your chambers during the probationary meetings?

Judge REAL. Twice at two 120-day meetings.

Mr. SMITH. Right. And what about in open court?

Judge REAL. I had not met her in open court at that time.

Oh, I am sorry. In her criminal case?

Mr. SMITH. Right. I am talking about——

Judge REAL. At the time of her plea and at the time of her sentence.

Mr. SMITH. Right. And in the previous charges against her, how many times had she been in your court then?

Judge REAL. Only for her plea of "not guilty," her plea of "guilty," and the sentence.

Mr. SMITH. So three times in court and then twice in your chambers during the probationary meetings.

Judge REAL. With her probation officer.

Mr. SMITH. That is correct, and I am not implying otherwise.

In those five meetings that you had with Ms. Canter, is it not possible that you might have developed some personal concern for her well-being?

Judge REAL. Well, for her well-being only in terms of how she was doing on probation during the 120-day meetings, because that is the purpose of the meeting.

Mr. SMITH. Right. But during those five meetings where you got to know her, did you feel protective of her in any way?

Judge REAL. No. No more than any other probation candidate that I have had.

Mr. SMITH. Okay. Given the fact that those five meetings were all a matter of public record, did you consider recusing yourself in the case simply because of the appearance, at least to the public, of impropriety or perhaps favoritism?

Judge REAL. I did——

Mr. SMALTZ. I am going to object to your question, Mr. Chairman. You are talking about five meetings. He didn't have five meetings. She appeared before him at the time of her arraignment and her sentence——

Mr. SMITH. No, if you will please sit down, I will clarify what I asked about. The five meetings that I referred to were three times in open court and twice in his chambers during the probationary meetings. Those were five contacts. And if "contacts" is a better word, I will be happy to substitute that description.

The point I was making and the judge was just getting ready to answer was whether or not, during those five meetings or contacts you had with Ms. Canter, whether you developed any kind of a sensitivity to her well-being or felt concerned about her future.

Judge REAL. No different than any other probationer that I had.

Mr. SMITH. Okay. And then, as I mentioned, all five of these contacts were public. Wouldn't that perhaps give rise to a feeling among those who were observers that perhaps you did have some type of a personal feeling for her and about her well-being?

And, as a result of that, if you weren't going to recuse yourself—and you said that you decided not to—wouldn't that give rise, I think, to a justified appearance of impropriety to those who might be looking at this particular case, given the actions that you took?

Judge REAL. No, because my withdrawal of the bankruptcy case was for the purpose of finding out about the probation report, which had been illegally used. And I wanted to find out about that. And I finally did find out about it, because I issued an order to show cause against the lawyers in the bankruptcy, in the unlawful detainer——

Mr. SMITH. Right. That explains why you took the act you did, but my question was going to the appearance of impropriety, where you had on public record five contacts with this individual, and, given the actions that you took, it might well have resulted in the appearance of impropriety to those who might be objective observers. That is my point, if you want to respond to that.

Judge REAL. Well, I don't believe so——

Mr. SMITH. Okay.

REAL—Mr. Chairman, because I had the statutory ability to do that, and I had a purpose to do that, and it had nothing to do with her, in terms of her position.

Mr. SMITH. Right. And, again, because of those prior contacts, it did not occur to you to possibly consider recusing yourself?

Judge REAL. Not at that point, no.

Mr. SMITH. Okay.

Judge REAL. I did later.

Mr. SMITH. Okay. Judge Real, because of your actions, arguably the Canter family trust lost tens of thousands of dollars in lost rent and also in attorneys' fees. Did you feel any responsibility for the losses that were incurred by the Canter family trust?

Judge REAL. Mr. Smith, I don't know anything about the loss. I was not present and I was never called to the judicial council to answer any questions like that.

As a matter of fact, what happened was, we found out later, that the divorce court had permitted her to be in the house, because it was the house that she and her by-then-ex-husband was occupying. So it had nothing to do with my order that she was occupying that house.

Mr. SMITH. Okay. And you were not aware that she was occupying the house rent-free?

Judge REAL. I did not know how she was occupying—I knew she was occupying the house, but not how.

Mr. SMITH. Okay. And my last question——

Judge REAL. She claimed some right of possession to the house.

Mr. SMITH. Right, which was subsequently found not to be substantial, but——

Judge REAL. Somewhat later. Much later.

Mr. SMITH. Okay. And, Judge Real, one other question, and that is: If you were ruling on a matter that denies a property owner his property, isn't that person entitled to some explanation?

You are aware of the exchange you had with the individual involved, but don't you think, under the circumstances, it would have been proper judicial conduct to offer an explanation?

Judge REAL. Mr. Smith, I never made a decision to deprive the owner of his property. I never made that decision.

Mr. SMITH. Okay. Thank you, Judge Real.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Thank you, Judge Real. Good to see you again, and, I guess, better other places than here.

In this investigative process that is now under way in the 9th Circuit, are you able to speak in front of the investigative committee, much as you are doing here today, to give your version of these facts and respond to questions, or to submit materials in writing if that is the way they do it?

Judge REAL. I have already done that, Mr. Berman, and we filed our brief. As a matter of fact, on September 15th, we filed the brief in answer to the investigation.

Mr. BERMAN. Well, then I am going to stay away from—until such time as we see what they came up with, I am going to stay away from fact questions.

But given that you have, sort of, opened up the issue by coming here and testifying today, there is one thing that I didn't totally understand in your testimony. And it requires some speculation on your part, but it is speculation you obviously made and reached a conclusion about.

The inclusion of the pre-sentence confidential report in the motion to suspend the stay on the unlawful detainer action in the bankruptcy proceeding, what—I can speculate too, but what was your thought process about why that was included in that? Because it obviously—I guess your concern was that it shouldn't have been used, whatever its purpose. But what would have been the motivation for that?

Judge REAL. Well, in reviewing the bankruptcy file, the probation report was there, and it was the only part of the evidence that was offered to the bankruptcy judge for withdrawal of the reference.

Mr. BERMAN. Well, let me put it in my words to make sure I understand it. In a sense, are you saying that the only reason they had to put that in there was to show something about her that would cause the bankruptcy judge to be more sympathetic to removing the stay on the unlawful detainer action?

Judge REAL. That was my opinion then and my opinion now.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from California, Mr. Issa, is recognized for his questions.

Mr. ISSA. Thank you, Mr. Chairman.

I am trying to understand one part of the whole decision process. My understanding is that, in order to take something away from the court of primary jurisdiction, the bankruptcy court, you had to find cause.

What was your cause for taking away the decision of a lawfully appointed judge who specializes in that area of the law?

Judge REAL. The use of the probation report, which is my function as a United States district judge.

Mr. ISSA. No, I appreciate that. What I am trying to understand, though, is you took it away based on an allegation. Did you do

what most colleagues would do in a collegial environment and say, "It has been brought to my attention. Is this true?" Did you try to do any discovery separate from yanking the case and then looking at it?

Judge REAL. No, I did not, because the primary jurisdiction is not in the bankruptcy court. The United States district judges are the bankruptcy judges. And the bankruptcy judges, as such, with that title, are appointed by the——

Mr. ISSA. Right, but they are not your magistrates. They have separate authority and routinely conclude the case without the intervention of the district judge.

Judge REAL. Well, they do because we refer—we refer—those cases to them.

Mr. ISSA. Right, but it hadn't been your case. It hadn't started——

Judge REAL. No, it had not been my case, no.

Mr. ISSA. Okay. So you yanked the case based on an allegation, redecided de novo what a bankruptcy judge had decided, and did so based on the assumption that, without that particular proprietary report that you believe, appropriately I am sure, was for your use only, it could not have been decided otherwise?

Judge REAL. That was my opinion.

Mr. ISSA. Okay. Well, let's go through that, since you are a bankruptcy judge in addition to a district judge, since you have asserted that.

Because it does concern me, because, you know, I mean, I sort of grew up going into Federal court with the understanding that the difference between God and a Federal district judge is God doesn't think he is a Federal district judge. And that you have to assume that there is a great deal of power vested in you, but there is a limit.

Your decision—how often would you routinely allow somebody to remain in a home, paying no rent for over a year, based on what? In other words, in a normal bankruptcy case, the debtor in possession, so to speak, has to pay rent or vacate. That is not unusual, is it?

Judge REAL. Well, no. And I didn't—I had no concern about leaving her in the home. She had been placed there by the divorce court, the State court, the State divorce court. And——

Mr. ISSA. Well, no, had she been placed there or had she not yet been removed?

Judge REAL.—and the husband was ordered to pay support for her and her daughter. And——

Mr. ISSA. I appreciate that. But we are dealing with a decision made by a Federal judge pursuant to bankruptcy. And he had decided that, under the bankruptcy laws, which are Federal jurisdiction, that she had no right to stay there on a rent-free basis and that it was appropriate to say that she could not remain there.

Because the State court had not said, "Your right to be there is part of your divorce decree." Because if that were the case, there wouldn't have been the claim to the court, would there have been?

Judge REAL. No, she had a claim to the bankruptcy court. She had a claim to the bankruptcy court also. And a question of whether or not, aside from the marital property question, which the State

court had to decide and which I said the State court should decide—and I denied a motion to stay the marital court, so that the marital court could decide the marital property. But she also had a promissory estoppel right in terms of that, to try that before the bankruptcy court.

That is why I transferred the case to Judge Carter, because I felt then that it might have the appearance of impropriety if I tried that case or tried the facts surrounding that case.

Mr. ISSA. Well, I appreciate that, but, you know, I am still looking at an enrichment that occurred because you took a case from a court, reversed it by essentially allowing her to stay for a year, and didn't transfer it until a considerable time later.

Why in the world did you choose to enrich this woman for $35,000 of value, based on our notes? Why wasn't that something that couldn't have been left alone as part of the decision? Or why couldn't you have immediately said, "I am removing this document and sending it to a bankruptcy judge for consideration" without that document?

What was the reason for the delay that enriched her by so much?

Judge REAL. I don't know of any delay. The delay was, I think, occasioned by the lawyers, who could have come to me, and did on two occasions—one occasion. And after the second occasion, they did what they should have done at the end of the first occasion. And that is, they should have gone to the court of appeals.

Because the Canters—this was the husband's father who had title to the property, but they had possession of the property. And the State court had allowed her in the property, I take it in lieu—I don't know that—but in lieu of support for her and the daughter. And the husband was working for the father-in-law.

And this is all hindsight now. This was not known to me at the time that I made that decision. But hindsight, there is some question as to whether or not the husband should have been paying the father the rent that supposedly he had promised to the father, as support for the woman and her daughter.

That was not——

Mr. ISSA. Mr. Chairman, will there be a second round?

Mr. SMITH. The gentleman's time has expired, and we do not expect a second round.

Mr. ISSA. Can I just leave with one question?

Mr. SMITH. The gentleman is recognized for an additional minute.

Mr. ISSA. Hopefully you can respond in writing; I would appreciate it. If you would just explain to me why in the world you would not simply have—once you pulled this from one judge who had considered a piece of information—inappropriately, in your opinion, and I am not disputing that—removed that document, immediately put it back down to the bankruptcy judge. If you had done that, wouldn't we have no reason to be here today?

And that is the whole question, is, if you had done simply curing what you say was wrongfully looked at and putting it back to a judge immediately, wouldn't we appropriately not be here today?

Thank you, Mr. Chairman.

Mr. SMITH. Okay. Thank you, Mr. Issa.

The gentleman from California, Mr. Schiff, is recognized for questions.

Mr. SCHIFF. Thanks, Chairman.

I wanted to begin by echoing a couple of the sentiments expressed by my colleague Mr. Berman from California. I have appeared in Judge Real's court. I have known at least a couple of his counsel for many years.

And this is not the circumstances in which I wished to see you again, Judge Real.

I also want to reiterate what Mr. Berman said, which is raising an issue about the desirability or propriety of going forward with this hearing when the 9th Circuit is still in the midst of its own proceedings, particularly in a case like this where, even if you accept all the facts that are laid out as true, there is a substantial question, I believe, about whether it would rise to an impeachable offense. The Chairman alluded to this in his opening statement.

But particularly where that is the case, where there is a substantial question where, even if all the facts were accepted as true, it would rise to an impeachable offense, I think it further calls into question why we would take action before the 9th Circuit finishes its own action and makes its own recommendation.

I have just a couple questions. One is on the misuse of the pre-sentence report that you alluded to, Judge.

I guess my threshold question is, why was the pre-sentence report in the bankruptcy proceeding to begin with? How did it get there? Did you ever ascertain how that report would have gotten there? Did someone in the bankruptcy proceeding request it of the probation office? Why did the probation office provide it in a bankruptcy proceeding? That does seem extraordinary.

Judge REAL. The counsel who was representing Mr. Canter, the senior Canter, who was asking for the lifting of the stay, filed it with a request for judicial notice, filed it with the bankruptcy judge specifically for the purpose of the withdrawal of the stay.

Mr. SCHIFF. But how would he get a copy of the pre-sentence report?

Judge REAL. We never learned that. We have never learned that.

Mr. SCHIFF. Well, and I don't know if you can comment on this——

Judge REAL. It was not given to him by his wife.

Mr. SCHIFF. Well, was he made a witness in the proceedings in the 9th Circuit? Was he asked under oath how he got a copy of the pre-sentence report?

Judge REAL. No, he was not. His lawyer apologized profusely on the order to show cause but never told me how she got the probation report, which was filed in the divorce case.

And the bankruptcy lawyer on the order to show cause was represented by a lawyer who I had a lot of trust in and who told me it would be withdrawn from the bankruptcy and that the matter would be taken care of.

Mr. SCHIFF. Now, you mentioned that the pre-sentence report in the bankruptcy proceeding was the only evidence that they had, in terms of deciding whether to lift the automatic stay.

Judge REAL. That was the motion for judicial notice, and that was it, basically. There were some other things but nothing of any substance.

Mr. SCHIFF. And I don't know whether you can discuss this either, given that the confidentiality of the pre-sentence report may not be confidential anymore. Was there something in the pre-sentence report that was the basis of the argument in the bankruptcy about why the automatic stay should be lifted?

Judge REAL. Well, you know, probation reports, they have an awful lot of personal information that is given to the judge, so that the judge can make a determination as to what sentence to impose, which is not generally available to the public.

Mr. SCHIFF. You mention in your testimony that the action that you took did not have the effect of keeping her in the property and the loss of the $35,000 in revenue to the trust. Can you explain that? I am not sure I——

Judge REAL. Well, that is my opinion.

First of all, she was placed there by the State court, as I assume—and I don't know that, because I have not looked at the State file—but I assume that she was placed there as part of the support that comes from an order to show cause during the divorce proceedings for she and her daughter to live in the house during the period of time that the divorce was going on. And so, she was there by that order. She was not placed there by my order in any event—in any event.

And certainly, the withdrawal of the stay was done with an illegal purpose, at least in my view at the time, with an illegal purpose, and that is the illegal use of the probation report.

Mr. SMITH. The gentleman's time has expired.

Mr. SCHIFF. Mr. Chairman, may I have an additional minute, as well?

Mr. SMITH. Without objection, the gentleman is recognized for one more minute.

Mr. SCHIFF. I just wanted to comment on the five appearances that this defendant had in your courtroom. Three were during plea——

Judge REAL. She is at a lectern, and I am on the bench.

Mr. SCHIFF. In terms of those three in-the-courtroom proceedings, those are proceedings where she is required to be present and so are you.

Judge REAL. Yes.

Mr. SCHIFF. So if you weren't present, that would be a problem.

In terms of the two meetings with the probation officer, what you do is probably extraordinary, in the sense that I don't know of many judges that meet with all the probation officers every 120 days. I am not sure I know of any of them that does that.

Is it correct that your meeting with this probationer is a practice that you followed with—how many other of the probationers in your——

Judge REAL. Thousands of them that I have had over the 35 years that I have been doing that program.

Mr. SCHIFF. And the extent of your interaction with her is confined to those five meetings: the three you are required to have and the two that you have with all of your probationers?

Judge REAL. In the presence of the probation officer, yes.

Mr. SCHIFF. So you never had any meetings with her outside of the presence of the public in the courtroom or the probation officer?

Judge REAL. Never.

Mr. SCHIFF. And no phone conversations with her?

Judge REAL. No phone conversations, no letters, no nothing. I have never met her other than those three times in the courtroom and twice in the 120-day program.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Schiff.

The gentleman from Utah, Mr. Cannon, is recognized for his questions.

Mr. CANNON. Thank you, Mr. Chairman.

How many other judges do this kind of 120-day program?

Judge REAL. On our court, none.

Mr. CANNON. Do you know of other judges around the country that do that?

Judge REAL. I do, but I can't remember now, because I have sent some probation officers to other parts of the country and had the probationer report to that judge with the probation officer in that area.

Mr. CANNON. I think that is a remarkably good concept and one that takes an extraordinary amount of your time. And I appreciate that.

Does it work?

Judge REAL. They say it works. I have—at least the probation office tells me that I have a lot less violations of probation than the other judges.

Mr. CANNON. Well, it is obvious that you invest a lot in your job and your office and that you are quite a determined person. Is that a fair thing to say, do you think?

Judge REAL. Thank you.

Mr. CANNON. I am not sure that is actually—you know, it is a clear quality, at least from what I understand.

Is Ms. Canter attractive?

Judge REAL. You are asking me, and——

Mr. CANNON. Yes. Do you recall her?

Judge REAL. I recall her. And if you want just a frank answer, she is not attractive to me.

Mr. CANNON. What I am really—where I am—do you remember her? Did she make an impact on you? And there is some real anger over what happened, anger by the family, perhaps not at you, but at her, which led to someone getting a copy of her pre-sentence report and filing it.

Judge REAL. Yes.

Mr. CANNON. And your reaction to that filing was also angry, was it not?

Judge REAL. Absolutely.

Mr. CANNON. Well, can you describe that a little bit?

Judge REAL. Well, I think—that is a confidential report. That is something that we can't allow, because, if we allow it here, it then becomes a practice in every case in which we have a probation report, that it becomes part of what people try to get to help them with whatever they are doing outside of the court.

Mr. CANNON. And that anger that you felt, that righteous indignation, however you would characterize it, resulted in your taking an aggressive approach to that case and getting it transferred to yourself.

Judge REAL. Well, I think it was. I think a little bit of it was that I did not want to embarrass the bankruptcy judge.

Mr. CANNON. How could he have been embarrassed? Somebody filed something in his court, why would he be——

Judge REAL. Well, no, by my going to him and saying, you know, "You can't do this kind of thing"——

Mr. CANNON. Well, but he didn't do anything. Somebody filed that in his case.

Judge REAL. Well, somebody filed it, but he made the order withdrawing the stay based, at least in my view, based upon——

Mr. CANNON. And how was your view informed?

Judge REAL. How was it informed?

Mr. CANNON. Yes, why did you——

Judge REAL. I saw the bankruptcy file and saw that the report was part of a motion for judicial notice of this document.

Mr. CANNON. Right. And the bankruptcy judge then removed the stay.

Judge REAL. Yes.

Mr. CANNON. Did he refer to the pre-sentence report?

Judge REAL. He made no—no, bankruptcy judges don't make any reference to anything——

Mr. CANNON. Right. They are awfully busy.

Judge REAL. They are awfully busy, and they just——

Mr. CANNON. In fact, he may not have even looked at that pre-sentence report.

Judge REAL. He may not have. He may not have.

Mr. CANNON. But it was the violation of what you thought of as protocol, the rules of the court——

Judge REAL. Yes.

Mr. CANNON.—that enraged you and caused you to look at the file and then remove the judge from the case and take over the case yourself.

Judge REAL. Well, I didn't remove him from the case. I withdrew the case to my court.

Mr. CANNON. Your court. And that led to some nasty allegations. There are a lot of people that dislike you, I take it.

Judge REAL. No, I don't think there are a lot of people that dislike me. There are a few.

Mr. CANNON. Do you recall having a call from the attorney general, General Dan Lungren at the time, about an order you made during which he explained to you that California law prohibited him from doing what you asked?

Judge REAL. Yes. I do remember——

Mr. CANNON. Do you recall what your response to him was?

Judge REAL.—that, very well.

Mr. CANNON. What was your response to him?

Judge REAL. My response to him was that he was wrong. And I thought he was wrong at the time——

Mr. CANNON. Did you give him a rationale for why he was wrong, or did you just——

Judge REAL. I believe I——

Mr. CANNON.—order him to do something?

Judge REAL. I believe I did. But I don't remember. I don't remember all of the detail of that. But I knew Dan Lungren, and I thought we were friendly. And that was a situation——

Mr. CANNON. Would you characterize that conversation as relatively arbitrary, on your part, or as friendly and rational?

Judge REAL. I thought, from my standpoint, it was friendly and rational, because he was telling me about a statute that I read differently than he did.

Mr. CANNON. Thank you, Mr. Chairman. I see my time has expired.

I hope that we can wait for the judicial report that we are expecting on this matter and come back. The problem here is complex. And on the one hand, we want tough judges—judges who are going to do things that make sense.

And may I ask for 1 minute, by unanimous consent?

Mr. SMITH. The gentleman's time has expired, but he is recognized, without objection, for an additional minute.

Mr. CANNON. We want tough judges. What we don't want are autocratic judges—judges that abuse their position. And a Federal judge has massive authority. And so, I hope that this case is one that we will revisit after we have a little more information from the judicial council.

Thank you, and I yield back.

Mr. SMITH. Thank you, Mr. Cannon.

The gentlewoman from California, Ms. Waters, is recognized for her questions.

Ms. WATERS. Thank you very much, Mr. Chairman.

I would like to place on the record that I do not know Judge Real, I have never met him, I have never called him, I have never talked with him, and I am not a lawyer.

So, having said all of that, my only question is, why are we holding this hearing, when I understand that there is still pending a hearing on this matter?

I guess I could ask you, Judge Real, if anyone disclosed to you why you would be here today, knowing that a hearing is pending.

There was one closed hearing, I am told. Is that correct? In Pasadena?

Judge REAL. There was one, yes.

Ms. WATERS. And there will be another one. Is that right?

Judge REAL. I believe so.

Ms. WATERS. Do you disadvantage yourself at all by being here today?

Judge REAL. I beg your pardon?

Ms. WATERS. Are you placing yourself at a disadvantage by being here today, trying to answer all of the questions of the Members of this Committee, when there is another hearing by your peers that is going to be held?

Judge REAL. I came by invitation, Ms. Waters. And I felt that it was more than just an invitation.

Ms. WATERS. Well, I think that Mr. Berman is absolutely correct in deciding that we should not try and delve into the facts of this matter here, that this should be left to the hearing that is pending,

and that we should not proceed with this hearing in this fashion today.

I commend you for being here. I don't know what your lawyer's advice to you was about coming here today. You are not under subpoena, is that right?

Judge REAL. I would rather not answer that question, Ms. Waters.

Ms. WATERS. All right. Thank you. I have no further questions.

Mr. SMITH. Okay. Thank you, Ms. Waters.

The gentlewoman from California, Ms. Lofgren, is recognized for her questions.

Ms. LOFGREN. Mr. Chairman, I will be brief.

I have also never met the judge before. I am a lawyer and have plenty of friends who have, in fact, appeared before the judge over the years.

I think it is important that we put this meeting here today in a context of what we are doing here in the Congress.

I am also not going to ask particular questions, because the Judicial Conference is reviewing this matter pursuant to the statute that we all participated in passing, the Judicial Improvements Act of 2002. And it seems to me that if we believed in the statute that we adopted, we would let that process move forward instead of engaging in this process.

Obviously the Congress has the responsibility to impeach in cases of high crimes and misdemeanors, and obviously judges under the Constitution, article 3, section 1, serve only during times of good behavior.

But I believe that we are here today because of the animosity felt by the majority toward the 9th Circuit, and that you are a victim of that animosity. And for that, I apologize to you.

Now, looking at the record, I have private opinions about some of your decision, honestly. And certainly you are not always a popular judge among the people I know who have appeared before you. But that is not a reason to shortcircuit the proceedings that have begun.

And I, again, would urge that, not only the Congress follow the process that we have established, but I think also the 9th Circuit should be a bit more prompt in utilizing these structures that we have provided for them. If they had been more prompt, we certainly wouldn't be here today either.

So, with that, I would yield back the balance of my time.

Mr. SMITH. Does the gentlewoman yield back?

Ms. LOFGREN. I do.

Mr. SMITH. Thank you, Ms. Lofgren, for your questions.

That concludes the questions by the Members of this panel, Judge Real. And we thank you for appearing, and we thank you for your responses today.

Judge REAL. Thank you, Mr. Chairman.

Mr. SMITH. Would our next witnesses please come forward and remain standing? And I will swear you all in.

[Witnesses sworn.]

Thank you, and please be seated.

Mr. SMITH. Our first witness is Arthur Hellman, professor at the University of Pittsburgh School of Law. Professor Hellman has tes-

tified a number of times before our Subcommittee on Courts and constitutional issues. We received his B.A. magna cum laude from Harvard College in 1963 and his J.D. in 1966 from the Yale Law School.

Our next witness is Andrew E. Smyth, a private attorney from Los Angeles, California. Mr. Smyth represented Deborah Canter in the bankruptcy action that gave rise to these proceedings. He has served as a deputy public defender for Riverside County, California, and for the past 29 years has practiced law in the Los Angeles area, specializing in bankruptcy law. Mr. Smyth is a graduate of the University of California-Los Angeles and the University of Southern California's School of Law.

Our final witness is Charles Geyh, professor of law at the Indiana University School of Law. Before teaching, Professor Geyh clerked for the 11th Circuit, practiced law in Washington, and served as a counsel for the House Judiciary Committee. He earned his undergraduate and law degrees from the University of Wisconsin.

Welcome to you all.

We have written statements from all the witnesses. And, without objection, the complete opening statements will be made a part of the record. However, would you please limit your oral testimony to 5 minutes?

And, Professor Hellman, we will begin with you.

TESTIMONY OF ARTHUR HELLMAN, PROFESSOR OF LAW, PITTSBURGH SCHOOL OF LAW

Mr. HELLMAN. Thank you, Mr. Chairman.

Nobody can take any pleasure in the circumstances that bring us to this hearing room today. But there are, I think, some good reasons why we are here. Allegations of serious misconduct have been lodged against a Federal judge, and those allegations come not simply from a citizen complainant but also from respected members of the Federal judiciary.

Under the Constitution, when a Federal judge is accused of serious misconduct, the power of impeachment is vested solely in the House of Representatives. But impeachment is a cumbersome process, and more than 25 years ago, Congress established an alternate set of procedures—procedures that Congress hoped would enable the Judiciary itself to deal with all but the most serious instances of misbehavior by Federal judges.

In this particular matter, though, the procedures did not operate as they should have done, as the Breyer Committee concluded so very, very forcefully in the report it issued Tuesday. And so, we find ourselves here.

The resolution that is the subject of this hearing raises two questions.

First, do the accusations against Judge Real fall within the category of very serious abuses that, under the Constitution, may be the subject of impeachment proceedings?

Second, if there is a possibility that Judge Real has committed an impeachable offense, what recommendation should this Subcommittee make to the full House Judiciary Committee in response to the charge from the Chairman?

On the first question, my view is that, based on the public record, the allegations against Judge Real could provide an adequate basis for impeachment, but only marginally so. There are no allegations of criminality, and based on the available record there is no evidence of corruption. In modern times, no Federal judge has been convicted and removed from office without a showing of criminality or corruption or both.

On the other hand, the allegations may fit within the broad concepts of malconduct and abuse of power that the framers had in mind when they drafted the impeachment provisions. In addition, in 1913, the Senate voted to convict Judge Robert Archbald on an article of impeachment that did not, within its four corners, allege either criminality or corruption.

Putting all that together, I concluded in my statement that it is at least possible that impeachment is warranted.

Now, obviously I had not heard Judge Real's testimony when I wrote my statement, and you may conclude, based on that testimony, that no further action by the House is necessary. But I will assume for the moment that you have not ruled out the possibility that impeachment proceedings are justified.

That brings me to the second question. On that assumption, what course of action should the Subcommittee recommend to the full Committee?

And here it seems to me that the key fact is that, at long last, a special committee has been appointed under chapter 16 of the Judicial Code to investigate the alleged misconduct. And in my view, the preferable course of action is to suspend proceedings on H. Res. 916 until the special committee has completed its work and the judicial council and/or the Judicial Conference have acted upon its report.

Now, I understand and share the frustrations at the failure of the 9th Circuit to appoint a special committee until more than 3 years after the filing of the complaint, two separate rulings by the judicial council, and a ruling by a committee of the Judicial Conference of the United States.

But that history cannot be undone. And from a forward-looking perspective, the House can only benefit from waiting for the processes within the Judiciary to run their course. At best, the council and the conference will deal with the matter in a way that satisfies all of you that justice has been done. At worst, you will be able to proceed with impeachment on a much stronger footing than you can do today.

You will have a full record, compiled through the process that Congress itself has ordained. And whatever you do will have the enhanced credibility that comes from having given the judicial branch the opportunity to deal appropriately with a transgressor in its ranks.

I would like to conclude by looking beyond this particular controversy. Although I think that the Subcommittee should wait before acting on H. Res. 916, that doesn't necessarily mean that there is no work for the Subcommittee to do.

In particular, the Subcommittee may want to consider whether the very troubling history of the accusations against Judge Real

and their treatment by the 9th Circuit, whether that has revealed gaps in chapter 16 that warrant legislative attention.

I mention some of those in my statement, and I will add one more: Maybe the statute should be amended to provide for some greater transparency. And I hope we have a chance to talk about these and other suggestions.

If the Judiciary Committee uses this unfortunate episode to strengthen the ability of the judicial branch itself to deal with judicial misconduct, that will provide something of a silver lining, whatever the outcome of the proceedings against Judge Real.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

Statement of

Arthur D. Hellman
Sally Ann Semenko Endowed Chair
University of Pittsburgh School of Law

House Committee on the Judiciary
Subcommittee on Courts, the Internet and Intellectual Property

Hearing on

H. Res. 916

Impeachment of Manuel L. Real

September 21, 2006

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Statement of
Arthur D. Hellman

Mr. Chairman, Ranking Member Berman, and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on H. Res. 916, "Impeaching Manuel L. Real, judge of the United States District Court for the Central District of California, for high crimes and misdemeanors."

According to the public record, the essence of the alleged misconduct is that Judge Real received an ex parte communication from a litigant and, based on that communication, engaged in "a raw exercise of power" that caused serious harm to that litigant's adversary. In my view, the accusations against Judge Real, if substantiated, could provide an adequate basis for impeachment and removal from office. However, a Special Committee has been appointed – belatedly – under Chapter 16 of the Judicial Code to investigate the alleged misconduct. I believe that the preferable course of action for the House (and this Subcommittee as its agent) is to suspend proceedings on H. Res. 916 until the Special Committee has completed its work and the Judicial Council and/or the Judicial Conference of the United States have acted upon its report. If the investigation by the Special Committee substantiates the allegations of misconduct against Judge Real, but the Judicial Council and the Judicial Conference fail to impose suitable punishment, the House will be able to proceed with impeachment on a much stronger footing than it could do today.

Before elaborating on these points, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I was recently appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 30 years. During that period, I have written numerous articles, books, and

book chapters dealing with various aspects of the federal judicial system. Of particular relevance to the present resolution, I testified at a hearing of this Subcommittee in November 2001 on "Operation of the Judicial Misconduct Statutes." Subsequent to that hearing, Chairman Coble, joined by Ranking Member Berman, introduced the bipartisan Judicial Improvements Act of 2002, which became law as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273.

I. The Alleged Misconduct

At the outset, I emphasize that I have no first-hand information about the alleged misconduct by Judge Real. Moreover, we have not yet heard from the Special Committee which, by Act of Congress, is the body designated to investigate such allegations. But this Subcommittee has an extensive public record to draw on, and based on that record, I believe that the nub of the allegations can be found in the order issued by the Judicial Council of the Ninth Circuit remanding the matter to the Chief Judge of the Circuit:

> [Judge Real] withdrew the reference in a bankruptcy case that was not previously assigned to him, and entered an order in that case based upon information he obtained ex parte from an individual who benefitted [sic] directly from that order.[1]

The individual who benefited from Judge Real's order was Deborah Canter. Ms. Canter was the debtor in the bankruptcy proceeding; she was also a federal criminal defendant whose case was pending before Judge Real. Judge Real had placed Ms. Canter on probation after she pled guilty to four counts of false

[1] In re Complaint of Judicial Misconduct, No. 03-89037 (Judicial Council of the Ninth Circuit, Dec. 18, 2003), reprinted in In re Complaint of Judicial Misconduct, 425 F.3d 1179, 1201 (Judicial Council of the Ninth Circuit, 2005) [hereinafter Judicial Council Order]. It is noteworthy that the Judicial Council's remand order was not itself published in the Federal Reporter.

statements and loan fraud. The order in question enjoined a judgment of the California state court that required Ms. Canter to vacate the house in which she and her husband had lived until they separated.

A somewhat more detailed – but still concise – account can be found in Judge Kozinski's opinion dissenting from the order of the Ninth Circuit Judicial Council affirming the dismissal of the complaint. Judge Kozinski provides, in essence, a bill of particulars with respect to the alleged misconduct. It is as follows:

> First, [in withdrawing the reference to the bankruptcy court and entering the order that stayed the eviction, Judge Real] acted based on information he obtained from the party [who benefited from] his orders, without disclosing this to the opposing parties or giving them an opportunity to correct any misstatements or exaggerations that may have been made to him in private. ...
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> Second, [Judge Real] withdrew the bankruptcy reference without any legal justification, for no reason other than to benefit the debtor by blocking her eviction [from the house that she had been ordered by the state court to vacate]. ...
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> Third, [Judge Real] acted without notice, in direct contravention of Fed.R.Civ.P. 65(a)(1) which states in categorical terms, "No preliminary injunction shall be issued without notice to the adverse party." ...
>
> Fourth, [Judge Real] failed to heed the other explicit procedures applicable to the issuance of an injunction, such as the requirements of a bond and a clear statement of reasons, see Fed.R.Civ.P. 65(c), (d), all of which are designed to provide transparency for purposes of appellate review and otherwise protect the interests of the party against which an injunction is entered. This was twice pointed out to the judge by the creditors in their motions for reconsideration, with no effect whatsoever.
>
> Fifth, [Judge Real] acted without even colorable legal authority. To this day, I am unaware of any conceivable legal basis the district judge might have had for enjoining the state court judgment and keeping the debtor in the Highland Avenue property at the expense of the Trust. Throughout these lengthy proceedings, the judge has offered nothing at all to justify his actions ... By his silence, [he] has implicitly acknowledged

> that his orders were a raw exercise of power, unsupported by any authority other than that of his commission. ...
>
> Sixth, [Judge Real caused the Trust] serious harm ... through his improvident actions. Not only was it forced to host the debtor on its property rent-free for years--at a cost estimated by the court of appeals at $35,000--but it also had to spend money on lawyers to bring two motions for reconsideration and a mandamus petition in the court of appeals.[2]

In short, the allegation (and I emphasize that it is an allegation, not a statement of fact) is that Judge Real received an ex parte communication from a litigant and, based on that communication, engaged in "a raw exercise of power" that caused serious harm to that litigant's adversary.

II. The Road to H. Res. 916

Judge Real's alleged misconduct took place six years ago. In August 2002, the Ninth Circuit Court of Appeals vacated the withdrawal of reference as well as the stay order.[3] That would probably have been the end of the matter – except that in the course of his lengthy career on the bench, Judge Real had made an implacable enemy, a Los Angeles attorney named Stephen Yagman.

In February 2003, Yagman filed a misconduct complaint against Judge Real under 28 USC § 351(a). The complaint alleged that Judge Real acted for inappropriate personal reasons in placing a "comely" female criminal defendant on probation "to himself, personally," and in withdrawing the reference in the bankruptcy proceeding of this probationer in order to "benefit an attractive female."[4] The Chief Judge of the Ninth Circuit, Mary M. Schroeder, conducted an inquiry into the accusations. On July 14, 2003, the Chief Judge filed an order

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[2] Judicial Council Order, 425 F.3d at 1194-95 (Kozinski, J., dissenting).

[3] In re Canter, 299 F.3d 1150 (9th Cir. 2002).

[4] See Judicial Council Order, 425 F.3d at 1180.

dismissing the complaint. In an accompanying memorandum, she stated that: (a) her inquiry "had not substantiated the conclusory charges of any inappropriate personal relationship between the judge and the defendant/debtor;" and (b) the withdrawal of bankruptcy jurisdiction was related to the merits of a judicial decision and thus was not cognizable under the misconduct statute.[5]

Yagman petitioned the Judicial Council of the Ninth Circuit for review of this order. The Judicial Council carried out its own inquiry.[6] Based on that inquiry, the Council issued an order vacating Chief Judge Schroeder's dismissal order and remanding the matter to the Chief Judge "for further proceedings consistent with our order." In response, Chief Judge Schroeder directed that a further inquiry be conducted. Based on that inquiry, she reached two conclusions:

> [Yagman's] factual allegations of an inappropriate personal relationship, and the Judicial Council's concerns about secret communications having occurred between [Judge Real and Ms. Canter] , are not reasonably in dispute within the meaning of 28 U.S.C. § 352(a).
>
> [The] unlawful filing of and references to a confidential pre-sentence report in [Ms. Canter's] bankruptcy proceedings constituted a legitimate basis for [Judge Real's] initial assumption of jurisdiction in the bankruptcy case sufficient to preclude a finding of judicial misconduct.[7]

Thus, the complaint was again dismissed – and, once again, Yagman petitioned for review of the order of dismissal. This time the Council found that

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[5] See In re Charge of Judicial Misconduct, No. 03-89037 (Nov. 4, 2004) (Schroeder, Chief Judge) at 2-3 (summarizing memorandum of July 14, 2003) [hereinafter Supplemental Order].

[6] In my view, the Judicial Council should not have undertaken its own inquiry at that point in the proceedings. If the Council believed, as apparently it did, that there were factual issues that remained unresolved, it should have directed the Chief Judge to appoint a Special Committee. The statute authorizes the Council to "conduct ... additional investigation" after receiving a report from a Special Committee, but it does not authorize investigation as part of the process of reviewing a dismissal. See 28 USC § 354(a)(1)(A).

[7] Supplemental Order, supra note 5, at 6.

"appropriate corrective action has been taken in this case." It therefore affirmed the order of dismissal.[8] Three members of the Council dissented. The most extensive dissent was by Judge Kozinski. Judge Kozinski concluded that "serious misconduct has been clearly established and discipline must be imposed consisting of nothing less than a public reprimand and an order that the district judge compensate the Trust for the damage it suffered as a result of the judge's unlawful injunction."[9]

Although Chapter 16 appears to preclude further review of a Judicial Council decision ratifying an order of dismissal, Yagman nevertheless sought review by the Judicial Conference of the United States. The Conference referred the matter to its Committee to Review Circuit Council Conduct and Disability Orders.[10] By a divided vote, the Committee concluded that "under the scheme of the statute, this Committee has no jurisdiction to review a judicial council's order if the chief judge has not appointed a special committee under 28 U.S.C. § 353."[11]

Judge Ralph K. Winter, joined by Judge Carolyn R. Dimmick, filed a vigorous dissent. The dissenters argued that the jurisdiction of the Conference should be determined by "looking beyond the form of the proceedings to their

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[8] Judicial Council Order, 425 F.3d at 1181-82. Technically, Chapter 16 does not provide for "affirmance" of a Chief Judge's order dismissing a complaint. Section 352(c) of Title 28 authorizes "[a] complainant or judge aggrieved by a final order of the chief judge" under section 352 to "petition the judicial council of the circuit for review thereof." The statute goes on to say: "The *denial* of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." (Emphasis added.) The implication is that if the Judicial Council finds the appeal to be without merit, it should deny the petition for review, not affirm.

[9] Judicial Council Order, 425 F.3d at 1199 (Kozinski, J., dissenting).

[10] This delegation is authorized by 28 USC § 331 (fourth paragraph).

[11] In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106, 109 (United States Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 2006).

substance," and that under that approach the Conference (and its Committee) did have jurisdiction. They concluded that "the proceeding should be returned to the Judicial Council for the Ninth Circuit with directions to refer it to the Chief Circuit Judge for the appointment of a special committee under Section 353."[12]

The Judicial Conference Committee order was issued on April 28, 2006. On May 23, 2006, Chief Judge Schroeder appointed a Special Committee to investigate Judge Real's conduct.[13] According to newspaper accounts, the Special Committee held a hearing on August 21, 2006. I understand that another hearing has been scheduled for November.

Meanwhile, on July 17, 2006, Chairman Sensenbrenner introduced H. Res. 916, "Impeaching Manuel L. Real, judge of the United States District Court for the Central District of California, for high crimes and misdemeanors." Chairman Sensenbrenner cautioned his colleagues and others "not to jump to any conclusions in this matter." He added:

> Today's resolution merely allows the House Judiciary Committee to open an investigation to determine the facts. Only after the House Judiciary Committee has conducted a fair, thorough, and detailed investigation, will committee members be able to consider whether Articles of Impeachment might be warranted.

Thereafter, the resolution was referred to this Subcommittee. That referral is the subject of the hearing today.

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[12] Id. at 116-17.

[13] Technically, the order of May 23 did not direct the special committee to investigate the allegations contained in the original complaint against Judge Real; rather, it initiated an investigation of two later complaints. But Chief Judge Schroeder stated explicitly that the investigation "should cover all matters reasonably within the scope of the 'facts and allegations' of complaint No. 05-89097 including the nature and extent of any ex parte contact with [Judge Real], as well *as any related matters raised by the Judicial Council in its remand to me after my first dismissal of [the initial complaint against Judge Real*]." (Emphasis added.)

III. The Constitutional Framework

The starting-point for consideration of H. Res. 916 is of course the Constitution of the United States. Four provisions of the Constitution are relevant.

The first is the judicial tenure provision of Article III. Section 1 of Article III provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.[14]

Implicitly, this language is supplemented by Article II section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

It has been accepted at least since the early 19th century that federal judges are included among the "civil Officers" who are subject to impeachment and removal under Article II.[15]

Finally, the process of impeachment is governed by Article I. Section 2 of Article I provides: "The House of Representatives ... shall have the sole power of impeachment." Section 3 adds:

> The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.

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[14] In this statement I shall use the modern spelling of "behavior."

[15] See Joseph Story, Commentaries on the Constitution § 402 (1833) (1987 reprint, ed. Rotunda). Story wrote: "All officers of the United States ... who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment."

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

The interpretation and interaction of these constitutional provisions has generated a voluminous body of scholarship and commentary. For present purposes, I take four propositions as established.

First, the impeachment process delineated in Articles I and II is the sole means of removing a federal judge from office. This is the view of most commentators; it was also the conclusion of the National Commission on Judicial Discipline and Removal established by Congress and chaired by a former Chairman of this Subcommittee. After extensive study and discussion, the Commission wrote:

> The Commission believes that removal may be effected only through the impeachment process. By "removal," the Commission means anything that relieves the judge of the aspects of office provided for in the Constitution--namely, the judge's commission of office, with its accompanying eligibility to exercise the judicial power, and nonreducible compensation.[16]

I recognize that Professor Raoul Berger took a different view in his 1973 book on impeachment,[17] but later scholars have persuasively rejected his arguments (and in particular his reliance on the common law writ of *scire facias*).[18]

Second, when Congress acts under the impeachment powers of Article I, its actions are not subject to judicial review. In *Nixon v. United States*,[19] the Supreme

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[16] Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 289 (1993).

[17] Raoul Berger, Impeachment: The Constitutional Problems 135-65 (1973).

[18] See, e.g., David R. Stras & Ryan W. Scott, Retaining Life Tenure: The Case for a "Golden Parachute," 83 Wash. U. L. Q. 1397, 1406-08 (2005).

Court held that the meaning of the word "try" in the Impeachment Trial Clause is nonjusticiable. More broadly, the Court found that "the Judiciary, and the Supreme Court in particular, were not chosen [by the Framers] to have *any* role in impeachments."[20] This underscores the unique and solemn responsibility that devolves upon the House – and upon this Subcommittee as its agent – when a resolution of impeachment is under consideration.

Third, the Constitution does not preclude all exercise of disciplinary power by the institutional judiciary over individual judges. This was the conclusion that Congress itself reached when it enacted the Judicial Conduct and Disability Act of 1980, now codified in Chapter 16 of Title 28.[21] Recently the D.C. Circuit Court of Appeals agreed with this conclusion in a decision rejecting constitutional claims advanced by Judge John H. McBryde, who had been sanctioned under the Act by the Judicial Council of the Fifth Circuit.[22] Although the court found that the most serious sanctions imposed on Judge McBryde were moot, it reached the merits of some of his arguments. In doing so, it endorsed four propositions that are relevant to the present proceedings. They may be summarized as follows.

> 1. The guarantees of judicial independence in the Constitution are designed primarily, if not exclusively, to safeguard the Judicial branch from "encroachment or aggrandizement" by the Executive and Legislative

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[19] 506 U.S. 224 (1993).

[20] Id. at 234 (emphasis added).

[21] The full name of the statute was the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Minor changes were made in later years, notably in the Judicial Improvements Act of 1990. More substantial revisions were made in 2002 when Congress enacted the bipartisan Judicial Improvements Act of 2002, cosponsored by Chairman Coble and Ranking Member Berman of this Subcommittee. It was the 2002 law that gave the judicial misconduct provisions their own chapter in the United States Code.

[22] McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States, 264 F.3d 52 (D.C. Cir. 2001), rehearing en banc denied, 278 F.3d 29 (D.C. Cir. 2002), cert. denied, 537 U.S. 821 (2002).

branches. They are not designed "to insulate individual judges" from influence or control by the "the judicial branch itself."

2. Under the Constitution, Congress may authorize the institutional judiciary to impose some sanctions, short of removal or disqualification, on individual judges for acts of "[a]rrogance" or "bullying" or other misconduct.

3. The internal disciplinary powers of the judiciary include the power to impose sanctions for a judge's conduct in the course of adjudication – that is, actions that the judge takes in deciding cases or otherwise performing the judicial function.

4. The internal disciplinary powers of the judiciary extend at least to the sanction of reprimand.

Fourth, although the precise relationship between the "good behavior" clause of Article III and the impeachment provision of Article II will never be settled definitively, it is generally accepted that the power of Congress to impeach and remove a federal judge can be exercised only for the "gravest cause"[23] or for "*very serious* abuses."[24] This follows from the Framers' concern for protecting judicial independence. It can be seen in the emphatic rejection by the Constitutional Convention of John Dickinson's proposal to add, after the "good behavior" provision in what is now Article III, the following qualification: "provided that [the Judges] may be removed by the Executive on the application [of] the Senate and House of Representatives." One delegate after another objected to Dickinson's motion. Said James Wilson: "The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our [Government]." Edmund Randolph "opposed the motion as weakening too much

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[23] John D. Feerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 30 (1970) (footnote omitted).

[24] Harry T. Edwards, Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges, 87 Mich. L. Rev. 765, 777 (1989) (emphasis in original).

the independence of the Judges." Only one state voted for the motion; seven voted against it.[25]

We are thus brought back to the constitutional framework as it exists. Under that framework, do the accusations against Judge Real fall within the category of "very serious abuses" that may be the subject of impeachment proceedings? Or do they point to a lesser form of misconduct that should be dealt with by the judiciary itself under the system of self-discipline authorized by Congress? To that question I now turn.

IV. Narrowing the Issues

In order to focus more precisely on the issue raised by H. Res. 916, it is useful to catalogue some potential issues that are not raised by the resolution.

First, there can be no suggestion that H. Res. 916 is an effort to punish Judge Real for an unpopular decision. As Chief Justice William H. Rehnquist commented in his book on impeachment, the acquittal of Justice Samuel Chase by the Senate in 1803 "has come to stand for the proposition that impeachment is not a proper weapon for Congress ... to employ" against judges whose decisions are viewed as "unwise or out of keeping with the times."[26] If I thought that H. Res. 916 had targeted Judge Real based on displeasure with the substance of his decisions, I would strongly oppose any effort to proceed with impeachment. But Judge Real has not decided any cases on the Pledge of Allegiance or same-sex marriage or the various other subjects that arouse public passions today. There is absolutely no reason to think that H. Res. 916 is anything other than what it

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[25] The account in this paragraph is based on 2 Max Farrand, The Records of the Federal Convention of 1787 at 428-29 (1911); and Feerick, supra note 23, at 21.

[26] William H. Rehnquist, Grand Inquests 134 (1992). I elaborated briefly on this point in my statement at the hearing held by this Subcommittee on the Constitution Restoration Act of 2004.

purports to be: an effort to assure punishment for apparent misconduct that already been condemned by respected federal judges.

Second, there can be no doubt that the allegations relate to Judge Real's performance of his duties as an Article III judge. This Subcommittee need not confront the difficult issue of whether impeachment is constitutionally permissible for off-the-bench activities or misbehavior unrelated to a judge's exercise of authority under Article III.

On the other side of the ledger, it does not appear that Judge Real has committed a felony or has violated a federal criminal statute. This is not a case like that of Judge Harry Claiborne, who was impeached after he was convicted by a jury of evading federal income taxes.[27] Nor is it a case like that of Judge Alcee Hastings. Although Judge Hastings was acquitted of criminal charges, the Judicial Council of the Eleventh Circuit found, after an extensive investigation, that Judge Hastings had engaged in a corrupt conspiracy to solicit a bribe and had "presented fabricated documents and false testimony in a United States District Court" in an attempt to conceal his participation in the conspiracy.[28] Nothing remotely comparable is found in the allegations against Judge Real. There is a federal statute that makes it a "high misdemeanor" for a federal judge to "engage[] in the practice of law,"[29] but no one has asserted that Judge Real violated that statute.

Finally, and of particular significance, I will assume that Judge Real has not committed any acts that could be deemed "corrupt" even if not criminal.

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[27] See Emily Field Van Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 168-72 (1999).

[28] See Alan I. Baron, The Curious Case of Alcee Hastings, 19 Nova L. Rev. 873, 874 (1995) (quoting Report of the Investigating Committee to the Judicial Council of the Eleventh Circuit).

[29] 28 USC § 454.

"Corruption" entails some kind of quid pro quo, actual or contemplated. A "corrupt judge" is a judge who "sells his honor and his decision"[30] or who "abuse[s] his power for his own personal aggrandizement."[31] On the basis of the public record, there is no evidence that Judge Real used his position as a federal judge for personal financial gain or other pecuniary or personal advantage.

Having said that, I recognize that the original complaint against Judge Real can be read as implying – without actually saying so – that Judge Real used his official position to benefit Ms. Canter in the hope or expectation of receiving sexual favors from her.[32] If the Subcommittee were to find evidence of "judicial action in exchange for sexual favors" (actual or requested), that would be a very different case. It would not be difficult to conclude that a judge who "sells his honor and his decision" for sexual favors is no less "corrupt" than a judge who does so for financial gain. But in the absence of evidence that that is what occurred here, I will assume that it did not.

Based on this analysis, I believe that the question raised by H. Res. 916 is this: Does the Constitution authorize impeachment of a federal judge for a misuse of judicial power that is not criminal and not corrupt, but that does cause harm to a litigant?[33] To answer that question, I look first at the evidence from the period of

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[30] Joseph Borkin, The Corrupt Judge: An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts 11 (1962).

[31] Edward H. Surrency, Book Review, 7 Am J. Leg. Hist. 184, 184 (1963) (review of Borkin book).

[32] Compare Judicial Council Order, supra note 1, at 1182 (majority opinion) (referring to "the specific allegation raised by the complainant of judicial action in exchange for sexual favors") with id. at 1188 n. 5 (Kozinski, J., dissenting) ("there is no reference [in the complaint] to sexual favors, nor to any quid pro quo").

[33] Some may argue that I have defined "corruption" too narrowly. But I believe that it is preferable to adhere to the generally accepted definition and to frankly confront the question whether abuse of power without any quid pro quo can constitute an impeachable offense. At the

the Framing and then at the impeachment precedents that I believe are most closely on point.

V. The Meaning of "Other High Crimes and Misdemeanors"

Under the Constitution, Judge Real may be impeached and removed from office only for "Treason, Bribery, or other High Crimes and Misdemeanors." Does this phrase encompass a judge's misuse of judicial power to benefit one litigant at the expense of another, when his actions are neither criminal nor corrupt? I believe that it does, at least where the abuse of power is serious and the injury is substantial.

I base this conclusion, in part, on the history of the impeachments clause. Initially the clause provided for impeachment only on the basis of treason or bribery. George Mason argued that this was too limited: "Attempts to subvert the Constitution may not be Treason as above defined." He therefore moved to add after "bribery": "or maladministration." James Madison objected that "maladministration" was too "vague." Mason thereupon withdrew "maladministration" and substituted "other high crimes & misdemeanors." With that alteration, his motion passed by a vote of 8 states to 3.[34]

What is striking here is that the phrase "other high crimes and misdemeanors" was added on the floor of the Convention without discussion, or at least without discussion that Madison thought it necessary to record. While we must be wary of putting too much weight on negative evidence, the most natural inference is that the delegates did not think that they were using a narrow and

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same time, there is no need to consider whether abuse of power without injury to a litigant falls under Article II, because the allegations undoubtedly include financial damage to the Trust.

[34] The account in this paragraph is based on 2 Farrand, supra note 25, at 550.

technical term. Rather, they were broadening the grounds for impeachment while avoiding (they hoped) the vagueness of the term "maladministration."

In any event, the debates at the Convention are of only limited utility in the present context. When the delegates were considering the grounds for impeachment, the impeachment clause applied only to the President.[35] The President would serve for a specified term of years, so there was no need to consider the relationship between impeachment and tenure during "good behavior."

For an analysis of the impeachment provisions that does focus on judges, we must look at the ratification debates, and in particular at the Federalist Papers. Alexander Hamilton addressed the point directly in Federalist No. 79. In an oft-quoted paragraph, he wrote:

> The precautions for [federal judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.[36]

Two points about this analysis deserve emphasis. First, in describing the behavior that will justify impeachment of a judge and removal from office, Hamilton does not use either of the phrases that are part of the constitutional text. He does not say that judges may be removed if they fail to meet the Article III standard of "good behavior," nor does he quote the language of Article II referring

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[35] The decision to make the Vice President "and other civil Officers" subject to impeachment was made later on the same day that the words "other high Crimes and Misdemeanors" were added to the impeachments clause. See id. at 552.

[36] The Federalist at 532-33 (No. 79) (Jacob E. Cooke ed. 1961).

to "Treason, Bribery, or other high Crimes and Misdemeanors." Rather, he states that federal judges "are liable to be impeached for *malconduct*."

Hamilton was a careful lawyer. He was also as familiar as any man then alive with the language of the proposed Constitution. The fact that he used the word "malconduct" strongly suggests that he did not interpret "Treason, Bribery, or other high Crimes and Misdemeanors" as embracing only violations of criminal statutes; rather, he read the language of Article II – at least when applied to judges – as including a broader category of misbehavior.

This interpretation is reinforced by the final sentence of the quoted passage. After summarizing "the article respecting impeachments," Hamilton adds: "This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find *in our own Constitution in respect to our own judges*." This last phrase is often cited as describing the United States Constitution.[37] However, I believe that the final clause is much more plausibly read to refer to the New York State Constitution. Hamilton speaks of "our own Constitution" and "our own judges," and of course, the Federalist Papers are addressed to "the People of the State of New York."

What then do we find in the New York Constitution as it stood at the time of the debates over ratification of the United States Constitution? The State of New York had adopted its Constitution in 1777. The tenure of judges was governed by Article XXIV. That Article provided:

> ... that the chancellor, the judges of the supreme court, and first judge of the county court in every county, [shall] hold their offices during

[37] For example, in Nixon v. United States, 506 U.S. 224, 235 (1993), the Court, speaking through Chief Justice Rehnquist, said, "In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature." The Court then quoted the passage set forth in the text above, emphasizing the entire last sentence.

> good behavior or until they shall have respectively attained the age of sixty years.[38]

The standard for impeachment was set forth in Article XXXIII. That article provided:

> That the power of impeaching all officers of the State, for *mal and corrupt conduct* in their respective offices, [shall] be vested in the representatives of the people in assembly ...[39]

It thus appears that Hamilton thought that "Treason, Bribery, or other high Crimes and Misdemeanors" was not all that different from "mal and corrupt conduct."

I do not suggest that this history provides a definitive answer to the question whether a federal judge may be impeached and removed from office for a serious misuse of power which, though neither criminal nor corrupt, benefits one party in a case before him and injures another party. But it does seem to me that, based on the history as well as the text, an affirmative answer is easier to defend than a negative one.

The point can be made in another way. As far as I am aware, there was not a word in the debates in Philadelphia that even hinted at the possibility that the judiciary would have some sort of internal mechanism for disciplining errant judges. But the text of the Constitution makes clear that judges serve only during "good behavior." Which is more likely to represent the intent of the Framers: that a judge who misused power in the way I have described could be impeached and removed from office, or that he would remain on the bench as though nothing had happened?

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[38] 5 Francis Newton Thorpe, The Federal and State Constitutions 2634 (1909).

[39] Id. at 2635 (emphasis added).

I believe that the conclusion suggested here is consistent with the careful and thorough analysis of the impeachment provisions published by Professor (later Dean) John D. Feerick more than 35 year ago. Professor Feerick wrote:

> In framing the impeachment provisions, the concern of the framers was not limited to crimes of which private citizens and public officials could be equally guilty. ... What the framers seemed greatly concerned about during their discussion of impeachment was the abuse or betrayal of a public trust, offenses peculiar to public officials. ... The debates reveal that the framers were heavily motivated in fashioning the impeachment provisions by the possibility of tyrannical, oppressive, corrupt and willful use of the power connected with a public office.[40]

It is no stretch at all to say that this description encompasses the allegations against Judge Real.[41]

VI. The Impeachment Precedents

In the history of the United States, only 13 federal judges have been impeached by the House.[42] Four (Chase, Peck, Swayne, and Louderback) were acquitted by the Senate. Two (Delahay and English) resigned before the Senate held an impeachment trial.[43] Seven judges were convicted and removed from office (Pickering, Humphries, Archbald, Ritter, Claiborne, Hastings, and Nixon).

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[40] Feerick, supra note 23, at 53.

[41] Professor Feerick quotes at length from the lectures of Richard Woodeson, an English historian who was a contemporary of the Framers. See id. at 54 & n. 284. Woodeson indicated that a "magistrate [who] introduce[s] arbitrary power" would be subject to impeachment. Recently the Supreme Court relied heavily on Woodeson in ascertaining the meaning of the Ex Post Facto clause. See Carmell v. Texas, 529 U.S. 513, 522-24 (2000); see also Stogner v. California, 539 U.S. 607, 613 (2003). The Court noted that Woodeson's treatise "was repeatedly cited in the years following the ratification by lawyers appearing before this Court and by the Court itself." Carmell, 529 U.S. at 523 n.10.

[42] For a comprehensive account of the various impeachment proceedings, see Van Tassel & Finkelman, supra note 27.

[43] In fact, Judge Delahay resigned after the House had agreed to a resolution of impeachment but before articles of impeachment were actually drafted. See id. at 119-20.

Most of the convictions have little relevance in the present context. This is particularly true of the three most recent convictions (Claiborne, Hastings, and Nixon), all of which involved criminality or corruption or both. However, one of the earlier convictions does have some bearing on the accusations against Judge Real, and that is the conviction of Judge Robert W. Archbald in 1913.

Judge Archbald was a member of the short-lived Commerce Court. Thirteen articles of impeachment were voted against him by the House. Overall, the articles did accuse Archbald of corrupt behavior. The House Committee Report recommending impeachment said:

> [Judge Archbald] has prostituted his high office for personal profit. He has attempted by various transactions to commercialize his potentiality as judge. He has shown an overweening desire to make gainful bargains with parties having cases before him or likely to have cases before him. To accomplish this purpose he has not hesitated to use his official power and influence.[44]

Judge Archbald was convicted on five of the thirteen articles. Four of these (including the thirteenth, a catchall article) alleged specific acts of corruption. However, Article 4 did not. Article 4 involved a case that was decided by the Commerce Court in 1912. In that case, the Louisville & Nashville Railroad Co. challenged a ruling by the Interstate Commerce Commission.[45] Here are the allegations in Article 4:

- While the suit was pending before the Commerce Court, Archbald "secretly, wrongfully, and unlawfully [wrote] a letter to the attorney for [the railroad] requesting said attorney to see one of the witnesses who had testified in said suit on behalf of said company and to get his

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[44] House Report No. 946, 62d Cong. 2nd Sess., at 23.

[45] See Louisville & Nashville R. Co. v. ICC, 195 Fed. 541 (Com. Ct. 1912). The Commerce Court's decision was reversed by the United States Supreme Court. See ICC v. Louisville & Nashville Ro. Co., 227 U.S. 88 (1913).

explanation and interpretation of certain testimony that the said witness had given in said suit, and communicate the same to ... Archbald, which request was complied with by said attorney[.]"

- Later, while the suit was still pending, Archbald "secretly, wrongfully, and unlawfully again did write to the [attorney saying] that other members of [the court] had discovered evidence on file in said suit detrimental to the said railroad company and contrary to the statements and contentions made by the [attorney]." Archbald requested the attorney "to make to him ... an explanation and an answer thereto[.] "
- "[Archbald] did then and there request and solicit [the attorney] to make and deliver to ... Archbald a further argument in support of the contentions of the said attorney so representing the railroad company, which request was complied with by said attorney, all of which on the part of said Robert W. Archbald was done secretly, wrongfully, and unlawfully, and which was without the knowledge or consent of the said Interstate Commerce Commission or its attorneys."[46]

Note what is and what is not in this article. The article alleges that Judge Archbald sought and received ex parte communications from the railroad's lawyer about a case pending before Judge Archbald's court. It does not say that Judge Archbald sought or received any quid pro quo for helping the railroad to support its position. It does not even say what happened in the case.

Some of that information is provided earlier in the Committee Report, in the narrative account. The Report explains that the Commerce Court decided the case in favor of the railroad, with Judge Archbald writing for the majority (which included three other judges) and Judge Mack dissenting. The Report adds: "In the opinion of your committee, this conduct on the part of Judge Archbald was a misbehavior in office [sic], and unfair and unjust to the parties defendant in this case."[47]

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[46] House Report No. 946, supra note 44, at 26-27.

[47] Id. at 8.

The Senate convicted Archbald on Article 4 by a vote of 52 to 20. It did so even though the Article asserted, at most, an abuse of power that benefited one side in the case and injured the opposing parties.[48] The conviction on Article 4 thus stands as a strong precedent for the proposition that the alleged misconduct by Judge Real constitutes a high crime or misdemeanor within the meaning of Article II of the Constitution.

There is also a precedent that may be viewed as pointing in the other direction, although not with much force. In 1830, the House impeached Judge James H. Peck on a single article. The allegation was that Judge Peck "unjustly, oppressively, and arbitrarily" punished a lawyer for contempt of court.[49] In the Senate, there was not even a majority for conviction; the vote was 21 to 22.

The impeachment article describes what sounds like an abuse of power that was neither criminal nor corrupt. In that respect it resembles the accusations against Judge Real. But we have no way of knowing why the Senators voted to acquit. Judge Peck's counsel, William Wirt, acknowledged that "if [Judge Peck] knew that [the lawyer's behavior] was not a contempt, and still punished it as one, it would have been an intentional violation of the law, which would have been an impeachable offense."[50] But Wirt also argued that "a mere mistake of law is no crime or misdemeanor in a judge." Senators may have voted for acquittal on the ground that the House managers had not shown more than "a mere mistake of

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[48] In fact, it is by no means clear that Judge Archbald's actions caused any harm to the defendants. Four judges joined the opinion of the Commerce Court, and nothing in the House Committee report indicates that the other three judges saw or were influenced by the material that Judge Archbald obtained through his ex parte communications with the railroad counsel.

[49] See Van Tassel & Finkelman, supra note 27, at 113.

[50] See id. at 109.

law" without bad intent. The acquittal thus does not tell us much about whether the alleged misconduct by Judge Real constitutes an impeachable offense.

Looking at the precedents as a whole, I conclude that the allegations against Judge Real could provide an adequate basis for impeachment – but that the alleged misconduct is marginal when measured against the offenses committed by the judges who have previously been impeached and convicted.

VII. The Next Steps

Based on what I have said thus far, it would appear that the allegations against Judge Real, if substantiated, could provide a sufficient basis for impeachment and removal from office. However, I think it would be a mistake for the House to consider at this time whether Articles of Impeachment might be warranted. Rather, I believe that the House (and this Subcommittee as its agent) should suspend proceedings on H. Res. 916 until the Special Committee appointed by Chief Judge Schroeder has completed its work and the Judicial Council and/or the Judicial Conference of the United States have acted upon that report.

In saying this, I fully acknowledge three considerations that might suggest a different conclusion. First, the House of Representatives, and this Subcommittee as its agent, have the constitutional authority to initiate impeachment proceedings without waiting for action by any other agency or institution, including institutions created by Congress. Under Article I, the House of Representatives has "the sole power of impeachment." By enacting Chapter 16, Congress has established a mechanism that may assist the House in the performance of its constitutional responsibility, but nothing in that chapter diminishes the authority of the House to act on its own.

Second, it is understandable that Members of Congress feel some frustration at the fact that the Special Committee was not appointed until May 2006, more than three years after the filing of the original complaint against Judge Real.

Third, I am aware of the constraints of the Congressional calendar. It appears that the Special Committee will not file its report until November 2006 at the very earliest. By the time the processes within the Judiciary have been completed, the 109th Congress will have adjourned. And experience tells us that new committees will not be organized in the new Congress until February 2007.

Nevertheless, I believe that the prudent course of action is to suspend proceedings on H. Res. 916 until the proceedings within the Judiciary have been completed. Here is why.

First, in analyzing the constitutional issues raised by H. Res. 916, I have assumed the correctness of the factual recital in Judge Kozinski's opinion dissenting from the Circuit Council decision of Sept. 29, 2005. But Judge Kozinski did not carry out the full-scale investigation that Chapter 16 contemplates when the facts relevant to a complaint are "reasonably in dispute." Under Chapter 16, that responsibility is to be carried out by a Special Committee appointed under 28 USC § 353. A Special Committee investigation is now under way. The Special Committee may determine that the facts are not as Judge Kozinski believed them to be. We may discover, for example, that Judge Real is guilty of nothing worse than poor judgment and a failure to adequately explain his actions. If so, impeachment would certainly not be warranted.

Second, even if the "bill of particulars" laid out by Judge Kozinski is substantiated by the Special Committee investigation, the conduct it depicts is at the margin of impeachable conduct. There is no allegation that Judge Real violated

any criminal statutes, nor does Judge Kozinski suggest that Judge Real's behavior was corrupt. This is significant because an abuse of power that is at the margin of impeachable conduct can, in all likelihood, be dealt with adequately through the disciplinary process under Chapter 16. For example, Judge Kozinski suggested that sanctions should be imposed including "a public reprimand and an order that the district judge compensate the Trust for the damage it suffered as a result of the judge's unlawful injunction." The Subcommittee, and ultimately the House, might well conclude that those sanctions – or some equivalent – constitute an adequate penalty for the misconduct established.[51]

Finally, there is the possibility that the investigation by the Special Committee will substantiate the allegations of misconduct against Judge Real, but the Judicial Council and the Judicial Conference will fail to impose suitable punishment. In that event, the House will be able to proceed with impeachment on a much stronger footing than it could do today. It will have a full record, compiled through the process that Congress itself has ordained. And it will have the enhanced credibility that comes from having given the Judicial Branch the opportunity to deal appropriately with a possible transgressor in its ranks.

VIII. Conclusion

I conclude on a forward-looking note. In April 2006, Chairman Sensenbrenner and Chairman Smith introduced H.R. 5219, the Judicial Transparency and Ethics Enhancement Act of 2006. In June, the Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the bill. Three

[51] I recognize, of course, that Judge Real might well argue that Chapter 16 does not authorize the Judicial Council or the Judicial Conference to enter an order requiring him to compensate a litigant. If the Judiciary is unable to impose a suitable punishment, that might be a reason for proceeding with impeachment.

academic witnesses – Professor Ronald Rotunda, Professor Charles Geyh, and I – offered suggestions for improving the bill. My own suggestions focused primarily on three objectives: reinforcing the preservation of judicial independence; integrating the proposed new mechanisms into the existing statutory structure; and enhancing the transparency of the processes within the judiciary.

I hope that the Subcommittee on Crime will continue its work on H.R. 5219. In addition, this Subcommittee may wish to consider whether the troubling history of the accusations against Judge Real has revealed gaps in Chapter 16 that warrant legislative attention. For example, perhaps section 352 should be amended to clarify the narrow realm of the "limited inquiry" that the chief judge may undertake, in contrast to the "formal investigation" that requires the appointment of a Special Committee.[52] Perhaps the statute should draw a sharper line between the circumstances under which a chief judge may "dismiss the complaint" and those under which the chief judge may "conclude the proceeding."[53] Perhaps provision should be made for review by the Judicial Conference of the United States even when no Special Committee has been appointed. Perhaps the legislation should authorize a compensatory remedy for victims of judicial misconduct in appropriate circumstances.[54]

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[52] It is worth emphasizing that the Special Committee serves a dual function. It helps the public to ascertain whether allegations of misconduct are well founded. But its elaborate procedures also serve to protect the judge who is the subject of the complaint.

[53] In the present case, the chief judge dismissed the complaint, but the Circuit Council affirmed the dismissal on the ground that "appropriate corrective action has been taken." See Judicial Council Order, 425 F.3d at 1180, 1182. However, under 28 USC § 352(b), "corrective action" is a basis for concluding the proceeding, not for dismissing the complaint.

[54] As already noted, Judge Kozinski suggested that Judge Real should be required to "compensate the Trust for the damage it suffered as a result of the judge's unlawful injunction." But it is not clear that current law would authorize such a remedy.

This is not the occasion to develop these or other possibilities.[55] But if the Judiciary Committee of the House of Representatives seizes the opportunity afforded by this unfortunate episode to strengthen the ability of the Judicial Branch to deal with misconduct by judges, it will have performed a valuable service whatever the outcome of the proceedings involving Judge Real.

[55] In May 2004, Chief Justice Rehnquist established a committee, chaired by Justice Stephen Breyer, "to evaluate how the federal judicial system has implemented the Judicial Conduct and Disability Act of 1980." The Breyer Committee is expected to issue its report later this month. That report may provide additional suggestions for improving the operation of the 1980 Act.

Mr. SMITH. Okay, thank you, Professor Hellman.
Mr. Smyth.

TESTIMONY OF ANDREW SMYTH, ATTORNEY, LOS ANGELES, CALIFORNIA

Mr. SMYTH. Yes, good morning, Mr. Smith.

I was hired in December 1999 by Ms. Canter to represent her in a chapter 13 bankruptcy. She had filed herself right before the unlawful detainer trial to stop the trial.

I recognize this as what would be called a bad-faith bankruptcy, and that the judges do not like you filing simply to delay your eviction from a house you don't own. I substituted in, nevertheless, because I thought I could help her talk to the Canter family and get more time.

This was—the Canter husband Alan's lawyers asked me would I agree to modify the stay so a divorce matter could continue, which had to do with property rights. My view is that is one of the places the automatic stay does not apply; the divorce matter may go ahead. So I so stipulated.

Then I got the relief from stay petition. And I disagree with Judge Real; it would be granted no matter what was attached. All it needed to say was it was not her property, which it wasn't, and they were trying to evict her. A relief from stay is not a ruling that she loses or she leaves. It just removes a barrier that lets the State court matter go ahead.

I told her, "Let's not even defend it," because I don't like going in to see a bankruptcy judge defending such a case. We filed a plan to pay a minimal amount of $100, so we weren't really dealing with her creditors; we were using the bankruptcy just to keep her there.

I told her even if we had shown up in court, 90 percent of the time the judge will simply lift the stay. All the creditor has to say is, "This is an unlawful detainer matter. The property doesn't belong to the debtor." The judge, Zurzolo, wrote an opinion that the stay shouldn't apply because it is not property of the State and nobody is seeking money. I think the Los Angeles sheriff follows that.

Another misconception about the proceedings below that I think might be got from Judge Real's testimony is that there was no—the divorce matter did not keep her there. The house belonged to Alan Canter and the trust. They were not parties to the divorce court proceedings, so no order could have been issued against them. Clearly the divorce didn't keep her there because there was a U.D.—unlawful detainer—matter going on.

She hired another lawyer who stipulated to a judgment—it wasn't because of the probation report. She had a full day in court on her unlawful detainer, and she stipulated—she got herself an extra month. She got rid of tens of thousands of back rent as part of a deal. And in return, the Canter trust got an order of writ of possession. Everyone got what they wanted.

When Judge Real withdrew the reference and took over the case, there was no case or controversy in front of them. Nobody was asking for that. The matter had been resolved, as to possession.

I certainly didn't ask—I didn't make any motion that it be withdrawn. It was withdrawn, and then later he put the stay back in.

At that time, I substituted out of Ms. Canter's case, because I couldn't—I was doing things for her for either nothing or very low fees. And I said, "Well, I will keep writing things, but I don't want to go to court and use the time."

She came and asked me to write an adversary proceeding for her, which I was surprised she knew the term. She insisted we file a complaint asking for title to the house and part title to Canters. She had not claimed these as assets in her 13. I told her the proper place was Judge Denner's court.

No matter how much I insisted—Judge Denner was the divorce court judge—she insisted it be done in the bankruptcy court. So I ghost-wrote it for her, and it was filed.

I did write a pleading saying that when the Canters came in to dissolve Judge Real's injunction, I said there was irreparable harm. But in fact, the main prerequisite is a chance you are going to win, probably that you will prevail on the merits. Well, there was nothing in front of Judge Real the first time to prevail on the merits on. There was no case. It was unlikely we would prevail on the merits, because Ms. Canter never had an interest in the property.

Later we went to the 9th Circuit. I was mystified, had no reason to know why the judge did it. Mr. Katz, who was previously a bankruptcy judge, kind of kept asking me. I thought he might be accusing me of, you know, back-dooring a judge. I said, "I don't have any idea. I am as mystified as you."

Later I asked my wife, and she said she had written a letter, which turns out to be a declaration on Ms. Canter's behalf, and sent it to Judge Real.

I don't know if Judge Real ever got it. I know that he has admitted ex parte communication right in the probation matter.

So I feel he withdrew it. I think he helped her quite a bit. The rental value of the property—I live one block away—is not $1,000 a month, because that is Hancock Park. $1,000 a month was the dad giving the son a good deal. The rental value at that time was $3,500 a month.

I suppose I was happy my client got all of this time, but I just don't think there was any legal arguable basis for Judge Real to do what he——

[The prepared statement of Mr. Smyth follows:]

PREPARED STATEMENT OF ANDREW E. SMYTH

TESTIMONY OF ANDREW E. SMYTH CONCERNING

1. H. RES 916, A BILL TO IMPEACH

U. S. DISTRICT JUDGE MANUEL REAL

STATE OF CALIFORNIA)

) ss

COUNTY OF LOS ANGELES)

I, Andrew E. Smyth, declare the following to be true and correct under penalty of perjury.

1. I am a resident of Los Angeles, California.

2. I am an attorney licensed to practice law in California and in Federal Court in the Ninth Circuit. (My CV is attached to this declaration).

3. In or about December 6, 1999, I was hired to represent Deborah Canter in a Chapter 13 matter (BK Case No. LA99-49126). Ms. Canter had filed a Chapter 13 "in pro per," as her own attorney, just before an unlawful detainer trial. An unlawful detainer trial is a suit by a property owner, or a manager, to regain possession of his or her property.

4. In this case, the Canter Family Trust was the owner of real property on Highland Avenue in Los Angeles, California. The Canter Family Trust was seeking to evict Debbie Canter from the Highland Avenue property.

5. When Ms. Canter filed her Chapter 13 bankruptcy, this filing resulted in an "automatic stay," or injunction prohibiting The Canter Family Trust from continuing any court action to evict Ms. Canter. See 11 United States Code 362.

6. I filed a substitution of attorney in this Chapter 13 on December 6, 1999, after Ms. Canter had filed it and became Ms. Canter's attorney. At the "341a Meeting," often called the "First Meeting of Creditors," attorneys for Gary Canter, Debbie's ex-husband were present. These attorneys were concerned that the automatic stay prevented the divorce court from continuing with a family law matter concerning spousal support, child support and division of property between Debbie Canter and her ex-husband Gary Canter. (Gary's family owns Canter's Delicatessen, a well-known restaurant in Los Angeles). I told Gary Canter's lawyers that in my opinion the automatic stay did not apply to divorce cases.

7. After the 341a hearing, Alan Canter (Gary's father) filed a motion for "relief from the (automatic) stay." This is a motion that is almost always filed by plaintiffs in unlawful detainer cases. It is also a motion that is always granted by bankruptcy judges. In 30 years of practice before the bankruptcy court, I have seen less than one in 50 of these motions denied. The granting of relief from stay will allow the state court unlawful detainer trial to go forward.

8. When I received a copy of this motion, I told Debbie Canter I would not answer it. "Relief from Stay" is always granted if the debtor does not own the real property. Also, bankruptcy

judges do not like the use of Chapter 13's to delay state court eviction actions. So, I did not want to file an opposition and appear before the Judge.

9. Failure to file an opposition will not result in relief from stay being granted sooner than the hearing date.

10. Prior to the date of the hearing on the relief from stay, I received a proposed stipulation that only stated that the automatic stay would be modified to allow the divorce matter to proceed. I signed this stipulation on January 6, 2000.

11. I mistakenly believed that this meant the Canter family only wanted to continue with the divorce court action. I told Ms. Canter she may get to stay in the Highland Avenue house longer than I'd previously thought.

12. I then received an Order on January 26, 2000 lifting the automatic stay to allow the eviction to proceed. I then saw I had mistakenly given Ms. Canter incorrect advice and I told her she would have to move soon.

13. Debbie Canter was represented by another attorney in the unlawful detainer matter. That attorney stipulated with the Canter Family Trust that Ms. Canter must vacate the Highland Avenue property four weeks after signing the stipulation. (I believe the time was 4 weeks but I am not sure in the U.D. case).

14. I believe the stipulation gave Ms. Canter until March 2000 to move out of the Highland Avenue property.

15. In February 2000, I received an Order from Judge Manuel Real, "withdrawing the reference."

16. I knew that this term meant that Judge Real was taking over the bankruptcy case. District Court judges (Article III Judges) refer bankruptcy matters to bankruptcy judges (Article I Judges) and can withdraw the reference.

17. This was a complete surprise. In 25 years in bankruptcy court, I had never seen it happen or heard about it happening.

18. I knew Debbie Canter had had a probation hearing before Judge Real a few weeks before.

19. Ms. Canter had told me she was on probation to Judge Real and that she was going to this hearing. I did not think to ask Ms. Canter if she had asked Judge Real to intervene in her BK case. I felt that Judge Real had looked at the files as part of his probation review and decided to take over the case because it did not look like I was protecting Ms. Canter's interest.

20. I believe I was protecting Ms. Canter's interests. I was stipulating to matters (such as allowing divorce matters to go ahead), and not opposing matters (such as relief from stay in an unlawful detainer case) in a manner similar to most bankruptcy attorneys.

21. These are matters that the bankruptcy courts prefer to be handled in state court.

22. After Judge Real withdrew the reference, I received an Order from Judge Real reimposing

the stay in the unlawful detainer matter. (Judge Real was actually entering a new injunction because the "automatic stay" isn't reimposed).

23. I called Debbie's mother to tell her the good news. Debbie's mother put Debbie on the phone and I told Debbie. She seemed happy at the news.

24. The Canter Family attorney, Mr. Herbert Katz made a motion to dissolve this injunction. I filed an opposition stating that Debbie Canter qualified for injunctive relief because she would suffer "irreparable harm," if immediately evicted.

25. Judge Real denied the Canter family motion.

26. At around this time, Debbie asked me to help her in divorce court. Debbie told me that she and her husband Gary had paid a down payment on the Highland Avenue house when Gary's father, Alan, bought the house himself. Alan then rented them this house for one thousand per month. This was about $1,500 below the usual rental value in the area.

27. I felt that these facts gave Debbie only a weak to a claim to some ownership interest in this house. I did feel that her husband Gary was getting a higher salary in the form of subsidized rent. Based on this higher income I made a motion to increase spousal support or child support in superior court.

28. I do not remember the result of that motion.

29. I was charging Debbie very little and sometimes nothing for my services because I felt sympathetic to her situation.

30. About this time, I asked Debbie to substitute me out of all the cases because I could not afford to go to court for such low fees. I did say I would help her write up pleadings "in pro per" – where she went to court on her own without attorney representation.

31. I did substitute out of the Chapter 13 and divorce cases, to the best of my memory. All my files on these matters have been thrown out.

32. Although I was not attorney of record, I appeared with Debbie at the June 18, 2001 hearing where Judge Real would not give the Canter Family attorney a reason for not dissolving the injunction.

33. Prior to this hearing, I had written, at Debbie's request, an adversary complaint to be filed in Judge Real's court. This adversary complaint sought title to the Highland Avenue property and part ownership of Canter's Restaurant. This complaint was written "in pro per" – my name was not on it.

34. I have seen the superior court complaint Debbie filed about this time seeking title to the Highland Avenue property. Although it has "We the People" stamped on it – 90% of the wording is the same as the adversary complaint I wrote in bankruptcy court. I will supply copies of that superior court complaint. It can be seen on line at www.lasuperiorcourt.org under Civil Cases Case No. BC 272024.

35. I appeared before the 9th Circuit at the hearing on the Canter Family's appeal of Judge Real's

denial of the motion to dissolve the injunction. Prior to the hearing, Mr. Katz asked me if I knew why this had happened. Mr. Katz had asked that question before. I assured him I had nothing to do with it and was as mystified as he was.

36. The judges hearing the case asked me if I knew why Judge Real had acted as he did (I had not made any motion or request for Judge Real to do any of the things he did).

37. I told the 9th Circuit judges I thought he had done it because he thought I was not properly protecting Debbie Canter's interests.

38. When I got home, I told my wife Michelle, who works at my office, about the hearing. I also said, "I wonder why he did this." Michelle said, "Oh, it's because of the letter me and Debbie sent him."

39. I was a bit upset at this after having told Mr. Katz and the Ninth Circuit I had nothing to do with what happened.

40. I asked Michelle, "What letter?" She said that she and Debbie had sent a letter to Judge Real. She said the letter told Judge Real that she was about to be evicted and she needed more time to move. Michelle said the letter said that Debbie did not have the secretarial training needed to get a job and so could not move at present. The letter asked for a few months delay. (I never saw this letter or declaration. We have been unable to find it.)

41. Later Michelle said the "letter" was really a declaration on 28 line paper.

42. Michelle said Debbie was going to take the letter personally to Judge Real. Michelle told me that this letter was sent shortly before Judge Real took over the case. Michelle said that she called Debbie when Judge Real sent the Order stopping the eviction. Michelle said that Debbie, "roared laughing," and said, "I guess it worked."

43. I told Michelle it was breaking the rules to directly contact a Judge without telling the other side. And, I told her I might be in trouble for telling the 9th Circuit and Mr. Katz that I had nothing to do with what happened. We agreed not to mention what happened and that Michelle would never send anything like this to a Judge again.

44. Michelle Yi (Smyth) who is my wife came to the U.S. from Korea in 1977. I believe she did not realize that the rules here concerning asking people in power for help are much stricter than in Korea.

45. After Debbie's case had been over for about a year, I got a phone call from a 9th Circuit investigator. Among other questions, she asked me to tell her everything I knew about the Canter matter.

46. I decided not to risk failing to disclose the letter Debbie and Michelle had prepared for Judge Real. I told this investigator about the letter (I did not know it was a declaration). I then put Michelle on the phone to speak to the investigator.

47. This is the only possible ex parte communication I know about between Debbie Canter and Judge Real. I have heard that Judge Real has stated he was told at the probation hearing that

Debbie was about to be evicted. This is, of course, also ex parte communication.

48. Debbie Canter never told me she visited Judge Real other than at the probation hearing. I do not know if she delivered the declaration or not.

49. Ms. Canter never told me whether she had any personal relationship with Judge Real.

50. I will personally appear at the legislative hearing on this matter on September 21, 2006.

51. If called upon to testify as to the foregoing, I could and would so competently do so.

Executed this ___ day of September, 2006, at Los Angeles, California.

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ANDREW E. SMYTH

Declarant

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Mr. SMITH. Okay. Thank you, Mr. Smyth.
Professor Geyh.

TESTIMONY OF CHARLES GEYH, PROFESSOR OF LAW, INDIANA UNIVERSITY SCHOOL OF LAW

Mr. GEYH. Thank you, Mr. Chairman.

I could point to Professor Hellman and say, "I will say what he said," except law professors are incapable of such brevity. And so, I will take a couple of additional minutes.

It seems to me that we are in a matter that is under investigation in the Ninth Circuit, and there are, as far as I am concerned, four possibilities that could be out there.

One is, as Judge Real testified, that there was no misconduct, he did nothing wrong.

A second—and this is far-fetched, but, you know, additional investigation could conceivably reveal an illicit quid pro quo in which Judge Real made decisions in exchange for favors of some kind, sexual or otherwise, in which case I think there would be the kind of corruption that would clearly give rise to a crime or misdemeanor worthy of impeachable conduct.

The third possibility is that Judge Real simply engaged in an ill-advised ex parte communication.

And the fourth is that there was a certain form of, what I would characterize as, simple favoritism: not motivated by a quid pro quo, but simply by a desire to help out a litigant under circumstances in which the judge's impartiality was set to one side and the judge made certain decisions for the benefit of Ms. Canter, motivated largely by bias in her favor.

Which of these is, you know, remains up for grabs. I would argue, however, that, as to the last two, the possibility of an ex parte communication or simple favoritism, if you look at the impeachment precedents, there really isn't much out there in the way of support for the proposition that an isolated act of simple favoritism, absent a pattern of misconduct, would give rise to an impeachable offense.

Professor Hellman does refer to the Archbald case, although that really does involve a case involving an implicit quid pro quo there. We had multiple episodes in which Judge Archbald was out there engaging in business transactions with prospective litigants, benefiting himself at the expense of the adversary process.

And so, for that reason, I am a little bit leery of saying that stands as a proposition for something exactly like this, which is an isolated case.

That said, it is precisely because these cases are complex and it is precisely because oftentimes they give rise to a conclusion that an impeachable offense isn't there that, as of 1939, the Congress decided, "Enough of this. We are going to start turning over investigation of criminal matters to the Department of Justice. And we are going to start looking to the circuit judicial councils to investigate matters of judicial misconduct. And only after they have concluded are we going to be weighing in."

In 1980, you added an explicitly disciplinary mechanism which was a terrific idea, and it is an even better idea now, because Congress is busier now than it ever was before. There are more judges

now than there ever were before. And I worry that, if Congress gets back into the business of investigating judges on a regular basis, it is inevitably going to do it idiosyncratically.

The best solution is to turn to the judicial council first, wait for them to be finished, and if, on the basis of their conclusions, you say there is more evidence of an impeachable offense there, that is the time to go after it, not before.

Now, in this case, I think this Subcommittee is rightly frustrated, because you expect the circuit judicial council to do its job, and it hasn't. It hasn't done its job. And so you are understandably frustrated.

But it seems to me that the Breyer Commission report, which was issued yesterday, should give you a lot more confidence to go forward with what I think is the best way to proceed, as Professor Hellman suggests. They went forward, and on page 80 of their report they say that the Ninth Circuit bungled the process. And they tell the Ninth Circuit, here is what you need to do.

Under circumstances in which the Ninth Circuit is now continuing with the process—and I have confidence, frankly, that the Ninth Circuit will, now that it has the opportunity to listen to the Breyer Commission and see what it has to say, do the right thing.

In my prepared testimony, I suggest that, really, the best thing to do, if you are concerned, is to look at ways to improve the disciplinary process, rather than to re-open, sort of, the 19th-century practice of investigating judges on a regular basis.

And in my testimony, I suggest that one problem with the disciplinary process is that it is subject to such a vague standard; that, if you look at it, judges are subject to discipline if they engage in conduct "prejudicial to the expeditious business of the courts." What does that mean? It is a very vague standard.

My suggestion is, why not link it more directly to misconduct in the code of conduct for United States judges, which gives you specific dos and don'ts. If you look at that code, it says, "Don't engage in ex parte contacts. Don't exhibit favoritism." It provides a measure of clarity that would be very helpful. And I think it has been a mistake for the Judiciary not to follow it.

The Breyer Committee thinks so too. And yesterday they issued, among their recommendations, that, from this point forward, the Judiciary ought to be using the Code of Judicial Conduct to discipline judges. And I think that is wise.

Bottom line for me is, impeachment at the end of the road still might be something this Committee ought to explore. But the first recourse is to wait for the Ninth Circuit to finish its business, and then, once you have a full record, to go forward or not. Because I think it is unlikely that you are going to find an impeachable offense, but you could, for the reasons that Professor Hellman indicates.

Thank you.

[The prepared statement of Mr. Geyh follows:]

PREPARED STATEMENT OF CHARLES G. GEYH

Testimony of Charles G. Geyh on H.R. 916:
Impeaching Manuel Real, a Judge of the District Court for the Central District of California for High Crimes and Misdemeanors

September 21, 2006

My name is Charles G. Geyh. I am the John F. Kimberling Chair in Law at the Indiana University School of Law at Bloomington. I am the author of *When Courts & Congress Collide: The Struggle for Control of America's Judicial System (University of Michigan Press 2006),* and coauthor, (with Professors James Alfini, Steven Lubet, and Jeffrey Shaman) of the forthcoming fourth edition of *Judicial Conduct and Ethics (Lexis Law Publishing 2007).* I am currently co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct, and previously served as consultant to the National Commission on Judicial Discipline and Removal.

As described in the order and dissenting opinions in Complaint of Judicial Misconduct, 425 F.3d 1179 (2005), Judge Manuel Real allegedly gave preferential treatment to a litigant with whom he engaged in an inappropriate *ex parte* communication. These allegations raise legitimate issues of judicial misconduct. The issue, then, is not whether such allegations should be thoroughly investigated, but by whom, and to what end.

This hearing has been convened for the purpose of considering a resolution to impeach Judge Real. A brief survey of the history and precedent of judicial impeachments and their investigation by the House Judiciary Committee leads me to conclude that if Judge Real were found to have engaged in a quid pro quo, in which he offered a litigant preferential treatment in exchange for sexual favors or something else of value to the judge, the Committee could fairly conclude that he committed an impeachable offense. If, on the other hand, the most that can be shown is that Judge Real exhibited simple favoritism in an isolated case, unaccompanied by any quid pro quo, precedent and history suggest that the likelihood of impeachment and removal is extremely low. It was precisely because of cases like this, where the underlying facts are complicated and uncertain, and the nature of the judge's conduct, once ascertained, may not amount to a "high crime or misdemeanor," that in 1939, Congress began to search for ways to husband its scarce resources and spare itself time-consuming and often fruitless inquiries into garden-variety cases of judicial misconduct. That search culminated in The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, now codified at 28 U.S.C. §351, et seq., which established a system of judicial self-discipline. Some members of the Committee have expressed frustration with the Act and the judiciary's failure to police judicial misconduct adequately—a frustration I share. The solution, however, is to amend the Act to make it more readily enforceable—and not to revert to the long-abandoned practice of Committee impeachment investigations, which will sap Committee resources and create a risk of haphazard and idiosyncratic application of impeachment standards.

Like Professor Hellman, I conclude that the Committee should not proceed with an impeachment investigation until the Judicial Council of the Ninth Circuit has completed its investigation. It is possible that the Judicial Council will resolve the complaint against Judge Real in a manner satisfactory to the Committee, thereby obviating the need for the Committee to undertake a time-consuming investigation of its own. Even if the Committee concludes, on the basis of the Judicial Council's investigation, that an impeachment inquiry is warranted it will have the benefit of the Judicial Council's fact-finding and conclusions to supplement its work.

The Original Understanding of the Impeachments Clauses

The framers of the U.S. Constitution did not focus much attention on the judiciary and its accountability to the political branches, but to the extent they thought about it at all, what they thought about was the impeachment process. As Alexander Hamilton explained in Federalist 79:

> The precautions for [the judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of judicial character, and the only one which we find in our own Constitution with respect to judges.

When delegates to the Constitutional Convention debated the impeachment clauses, however, they were not concerned primarily with judges, but with the president, and whether subjecting him to impeachment and removal at the hands of Congress (they considered and rejected lodging the impeachment power with the Supreme Court and the state legislatures) was unnecessary, given that he was already subject to "removal" in periodic elections, or undesirable, insofar as it would create a dependency of the second branch on the first.

Apart from sporadic acknowledgment that judges would be subject to impeachment procedures,[1] Madison's notes of the Convention debates make meaningful reference to judicial impeachment only once—and even then, as a foil for distinguishing presidential impeachment. On July 20, 1787, Rufus King argued that judges but not presidents should be subject to removal by impeachment:

> It had been said that the Judiciary would be impeachable. But it should have been remembered at the same time that the Judiciary hold their places not for a limited time, but during good behaviour. It is necessary therefore that a forum should be established for trying misbehaviour. Was the Executive to hold his place during good behaviour? – The Executive was to hold his place for a limited term like the members of the

[1] *See, e.g.*, James Madison, Notes (August 20, 1787) in 2 FARRAND, *supra* note 29, at 344 (motion of Elbridge Gerry requesting that "the Committee be instructed to report . . . a mode of trying [the Supreme] Judges [in cases of] impeachment"); *id.* at 524 (statement of Gouverneur Morris alluding to the Senate's power to try the impeachment of judges in earlier and later drafts).

> Legislature. Like them . . . he would periodically be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it. Like them therefore, he ought to be subject to no intermediate trial, by impeachment. He ought not to be impeachable unless he hold his office during good behavior. . . .[2]

Implicit in King's observation is the hint of an underlying consensus on the need for judicial—as distinguished from presidential—impeachment. As to the behaviors for which a judge could be held accountable in the impeachment process, however, relevant discussion of impeachable offenses occurred almost exclusively in the context of debates on presidential impeachment. One somewhat elliptical exception occurred when Charles Pinckney proposed the creation of a Council of State to be comprised of specified officers, including the chief justice, each of whom, Pinckney asserted, "shall be liable to impeachment & removal from office for neglect of duty malversation, or corruption."[3] Otherwise, on July 20, the Convention approved a preliminary proposal subjecting the president to removal by impeachment for "mal-practice or neglect of duty."[4] Randolph argued that an impeachment mechanism was necessary to remedy the president's "great opportunitys of abusing his power."[5] Gouverneur Morris opined that "the Executive ought . . .to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment."[6] Bedford, however, worried that "an impeachment would reach misfeasance only, not incapacity" and urged the inclusion of some means to remove a president for senility and insanity.[7]

Toward the end of the Convention, it was proposed that impeachable offenses be limited to treason and bribery.[8] On September 8, George Mason moved to add "maladministration" to the list, arguing: "Attempts to subvert the Constitution may not be Treason," yet should be impeachable.[9] James Madison opposed Mason's motion, arguing that so vague a standard for impeachment would "be equivalent to a tenure during pleasure of the Senate."[10] As a compromise, Mason amended his motion without further explanation, substituting language that subjected civil officers to impeachment for "other high crimes & misdemeanors."[11]

The implication would seem to be that the phrase "high crimes & misdemeanors" was understood to reach "attempts to subvert the constitution" but not reach so far as to establish "tenure during pleasure of the Senate." In a number of respects, the drafters of the Constitution put a "uniquely American stamp"[12] on the impeachment process they

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[2] James Madison, Notes (July 20, 1787) *in* 2 *id.*, at 66-67.
[3] James Madison, Notes (August 20, 1787) *in* 2 *id.*, at 344.
[4] James Madison, Notes (July 20, 1787) *in* 2 *id.*, at 64.
[5] James Madison, Notes (July 20, 1787) *in* 2 *id.*, at 67.
[6] James Madison, Notes (July 20, 1787) *in* 2 *id.*, at 69.
[7] James Madison, Notes (June 1, 1787) *in* 1 *id.*, at 69.
[8] *See* Journal (Sept. 4, 1787), *in* 2 *id.*, at 493, 493. This debate took place in the context of executive impeachment, but the clause the delegates were crafting was to apply to all civil officers of the United States.
[9] *See* James Madison, Notes (Sept. 8, 1787), *in* 2 *id.*, at 547, 550.
[10] *Id.*
[11] *Id.*
[12] MICHAEL GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 10 (2nd Ed. 2000).

devised, but "high crimes & misdemeanors" had English antecedents that imbued the phrase with a preexisting meaning, as Michael Gerhardt explains:

> [I]n the English experience prior to the drafting and ratification of the Constitution, impeachment was considered a political proceeding, and impeachable offenses were political crimes. For instance, Raoul Berger found that the English practice treated "[h]igh crimes and misdemeanors as *political* crimes against the state." . . . In England, the critical element of injury in an impeachable offense was injury to the state. The eminent legal historian, Blackstone, traced this peculiarity to the English law of treason, which distinguished "high" treason, which was disloyalty against some superior, from "petit" treason, which was disloyalty to an equal or inferior. According to Arthur Bestor, "[t]his element of injury to the commonwealth — that is, to the state and its constitution — was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one."[13]

Consistent with Gerhardt's summary, Alexander Hamilton, writing in The Federalist, declared that impeachment was an appropriate remedy for "the misconduct of public men" taking the form of an "abuse or violation of some public trust" that "may with peculiar propriety be denominated *political.*"

On September 14, the Convention fended off one final attempt to expand Congress's impeachment power over the president. Rutlidge and Gouverneur Morris moved "that persons impeached be suspended from their office until they be tried and acquitted." Madison's objection, however, won the day and the motion was defeated:

> The President is made too dependent already on the Legislature, by the power of one branch to try him in consequence of an impeachment by the other. This intermediate suspension, will put him in the power of one branch only. They can at any moment, in order to make way for the functions of another who will be more favorable to their views, vote a temporary removal of the existing magistrate.[14]

Although the Convention fixated on presidential not judicial impeachment, the provisions they devised were unitary and applicable to each. The Convention's efforts to limit the impeachment power so as to protect the president from becoming overly dependent on Congress thus served equally (if serendipitously) to benefit the judiciary's independence.

The founders' fixation on Presidential impeachment complicates attempts to divine the scope of impeachable crimes and misdemeanors as they apply to judges. Clearly, their concerns ran to something more than indictable crimes; their focus was on misconduct, such as subversion of the Constitution, treachery and corruption that violated

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[13] *Id.* at 103-04.

[14] *See* James Madison, Notes (Sept.14, 1787), *in* 2 Farrand, *supra* note 29, at 612, 612.

the public's trust in some important way, regardless of whether it was separately indictable.

Against that backdrop, it would seem that a judge who gave preferential treatment to litigants in exchange for anything of value to the judge (such as sexual favors) would be engaging in a form of "corruption" that the founders would characterize as an abuse of the public trust and an impeachable crime. There is, however, no clear evidence to indicate that anything so extreme occurred in Judge Real's case, and whether lesser forms of bias or favoritism would qualify as impeachable offenses in the framers' minds is difficult to determine.

The Impeachment Precedents

With impeachment as the primary means by which to curb judicial misconduct, the question arose early and often as to the kinds of misbehavior for which judges could be impeached. The founding generation left a limited number of clues. Most obvious is the text of the impeachment clause itself: Judges, as a subset of "civil officers," are subject to impeachment for "treason, bribery, and other high crimes and misdemeanors." The meaning of treason and bribery seems clear enough as long as we don't get down to close cases, but what of "high crimes and misdemeanors"? As just noted, from the perspective of those who drafted the Constitution, "high crimes and misdemeanors" was a more precise impeachment standard than "maladministration," which they considered and rejected as overly broad and susceptible to excessive manipulation by the Senate. Although "high crimes and misdemeanors" might not appear to possess an intrinsic meaning any more narrow or plain than "maladministration," the drafters were not writing on a clean slate with only a dictionary to guide them. Impeachment was a process they imported from England, where impeachable conduct had been confined to political offenses against the state and characterized as "high crimes."[15]

Separate and distinct from the forms of misbehavior that are subject to impeachment is the question of severity: How serious must a "political" offense be to qualify as a "high . . . misdemeanor"? Since Article III limited judicial tenure to service during "good behaviour," one possibility would be to set the threshold for an impeachable misdemeanor at any behavior that is less than "good." There are, however, some behaviors — such as senility — that may be less than good but cannot easily be characterized as "misdemeanors," a term which implies bad motives or blameworthiness. That, in turn, suggests that there may be a gap between the floor of "good behavior" and the ceiling of an impeachable "misdemeanor." The same may be said of venial misbehavior, which may not be "good" but would not necessarily constitute "high . . . misdemeanors." The breadth of that gap, if one existed, was another aspect of the scope of impeachable offenses that experience would need to fill.

For the summary of judicial impeachment proceedings described below, I rely heavily on Emily Field Van Tassel & Paul Finkleman, *Impeachable Offenses: A Documentary History From 1787 to the Present* (1999).

Judges Removed: The House has impeached and the Senate convicted a total of seven judges:

[15] MICHAEL GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 109-10 (2nd ed. 2000).

• In 1804, District Judge John Pickering was impeached and removed for insanity (notwithstanding that the articles of impeachment ostensibly focused on the arbitrariness of his decisions in an isolated case)[16].

• In 1862, District Judge West Humphreys was impeached and removed for desertion.

• In 1913, Commerce Court and District Judge Robert Archbald was impeached and removed for abusing his position by entering into business relationships with prospective litigants, under circumstances that implied a quid pro quo.

• In 1936, District Judge Halsted Ritter was impeached and convicted on an omniubus charge of bringing the court into "scandal and disrepute," in light of other specific charges (for which he was acquitted) that he received kickbacks for appointing a former law partner as a receiver, and continued to practice law as a sitting judge.

• In 1886, District Judge Harry Claiborne was impeached and removed for tax evasion

• In 1989, District Judge Alcee Hastings was impeached and removed for soliciting a bribe.

• In 1989, District Judge Walter Nixon was impeached and removed for perjury.

Judges Impeached but not Removed: In addition to those removed upon conviction in the Senate, the House has impeached six other judges, whom the Senate acquitted or who resigned before their Senate trial:

• In 1805, the House impeached but the Senate acquitted Supreme Court Justice Samuel Chase for abusing his power in several cases.

• In 1830, the House impeached but the Senate acquitted District Judge James Peck for abusing his contempt power

• In 1873, District Judge Mark Delahay resigned after his impeachment in the House for drunkenness.

• In 1905, the House impeached but the Senate acquitted District Judge Charles Swayne, for a range of alleged misconduct, from overstating his travel expenses and accepting gifts from litigants to living outside his judicial district and abusing his contempt power.

• In 1926, District Judge George English resigned after his impeachment for misbehavior that ranged from misusing bankruptcy funds for private gain, abusing administrative powers over admission to practice before the court, to exhibiting favoritism in appointing bankruptcy receivers to obtain personal advantage, and being generally tyrannical.

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[16] CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 125-31 (2006).

• In 1933, District Judge Harold Louderback was impeached and acquitted of charges that he exhibited favoritism in the appointment of incompetent bankruptcy in an effort to enrich his friends.

Judges Investigated, but Neither Impeached Nor Removed: The House has investigated at least 78 judges over time (including the thirteen that the House ultimately impeached). A total of 148 known charges have been leveled against those 78 judges, and it may be useful for the Committee to see the range of conduct that has provoked impeachment inquiries over the years:[17]

- thirty two charges concerned abuse of judicial power (judges who allegedly made outrageous judicial rulings that disregarded the law);
- nineteen charges concerned abuse of administrative power
- fifteen charges concerned favoritism or bias
- fourteen charges concerned misuse of office for financial advantage
- thirteen charges concerned demeanor on the bench
- thirteen charges concerned solicitation of bribes or favors
- eleven charges related to nonperformance or incompetent performance
- ten charges concerned non-judicial misconduct
- eight charges related to the misuse of government funds
- thirteen charges related to other, miscellaneous misconduct, ranging from disloyalty, moonlighting and insanity, to failure to reside within the judicial district and omnibus claims of unfitness.

Surveying applicable precedent, no judge has been removed for an isolated act of simple favoritism (as distinguished from bribery or other more extreme acts of favoritism featuring quid pro quo, at issue in the cases of Alcee Hastings and Robert Archbald). Favoritism in the appointment of bankruptcy receivers featured prominently in the impeachment of Judge Harold Louderback and to a lesser extent in the impeachment of George English, but in each case a quid pro quo for the benefit of preexisting friends was at issue; moreover, in Louderback's case he was ultimately acquitted, and for George English, favoritism was but one of many charges that led him to resign. The charges against James Peck included an element of bias (the alter-ego of favoritism): The judge was accused of abusing his judicial power by holding a lawyer in contempt for criticizing the judge in the press, but the primary question there was whether a judge who made a high-handed judicial ruling committed an impeachable offense, and Peck's acquittal, coupled with prior and subsequent precedent suggests that the answer is no.[18] A total of fifteen judges have been investigated over the years for favoritism and bias. In every one

[17] For a tabulated summary of these investigations, see Charles Gardner Geyh, When Courts & Congress Collide: The Struggle for Control of America's Judicial System 120-25 (2006).
[18] Charles Gardner Geyh, When Courts & Congress Collide: The Struggle for Control of America's Judicial System 113-70 (2006).

of those cases, however, charges of favoritism have been accompanied by other accusations.

In short, the impeachment precedents reveal that favoritism exhibited in the context of quid pro quo arrangements, in which a judge gives preferential treatment to litigants or others for the benefit of the judge, smacks of impeachable corruption. Making decisions—administrative or judicial—as a means to improve the lot of relatives or friends would fall into this category. On the other hand, an isolated act of bias or favoritism that is neither part of a pattern nor the product of a corrupt quid pro quo has not been insufficient by itself to trigger serious impeachment efforts. The judge who, over the course of a matter, loses his impartiality, fails to disqualify himself, and renders decisions for or against a party out of favoritism or animus, would seem to fall into this category. To date, none of the facts adduced in Judge Real's case indicate a quid pro quo, although further investigation could conceivably reveal otherwise. It is precisely because Congress has been loath to bring the cumbersome impeachment machinery to bear in such cases that, beginning in 1939, it has depended increasingly on the judiciary to regulate itself.

Judicial Self-Regulation

In the Administrative Office Act of 1939, Congress established circuit judicial councils and empowered them to act in furtherance of effective and expeditious judicial administration, and in 1948 it amended the Act to state that the councils "shall make all necessary orders for the effective and expeditious administration of the business of the courts," and that " the district courts shall promptly carry into effect all orders of the judicial council."[19] During that time, Congress discontinued the 150 year old practice of independently investigating allegations of judicial misconduct, effectively ceding the task of initial investigation to the judicial councils and (in cases of criminal misconduct) the Department of Justice. By 1980, however, there was widespread concern that a significant volume of judicial misconduct was going unaddressed;[20]the limits of circuit council authority to impose discipline remained unclear, and a consensus emerged that some mechanism for judicial discipline short of impeachment needed to be devised. And so, Congress passed the Judicial Councils Reform, Judicial Conduct and Disability Act of 1980, which established the disciplinary mechanism in place today.[21]

During the 1980s, Congress impeached and removed three district judges. The process was cumbersome and time-consuming, and led to agitation for further reform. In 1990, Congress created the National Commission on Judicial Discipline & Removal, and in 1993 the Commission issued its report, which concluded that: "The Commission's analysis of experience under the 1980 Act and other formal mechanisms of discipline within the judicial branch reveals that existing arrangements are working reasonably well."[22]

Our current disciplinary regime contemplates that rank and file allegations of judicial misconduct will be initially investigated by the chief judge and the judicial council of the circuit courts. In this case, the Ninth Circuit Judicial Council's investigation into the Real matter is ongoing. It is entirely possible that after a thorough

[19] 28 U.S.C. 332.
[20] Charles Gardner Geyh, *Informal Methods of Judicial Discipline,* 142 U. Pa. L. Rev. 243, 243 (1993).
[21] 28 U.S.C. 351 et seq.
[22] Report of the National Commission on Judicial Discipline & Removal 6 (1993)

investigation, the Judicial Council will resolve the complaint against Judge Real in a manner satisfactory to the Committee. If the Judicial Council's resolution of the matter is, in the Committee's view, inadequate, the Committee may initiate its impeachment investigation then—an investigation that will be better informed by the results of the judicial council's inquiry. The judiciary is far larger today than it was a century ago; it is unrealistic to hope that the Committee can police judicial misconduct as it once did. To return to the practice of investigating garden-variety episodes of judicial misconduct will over-tax the Committee and inevitably lead to unsystematic and ultimately inadequate enforcement. Like Professor Hellman, I urge the Committee to stay its investigation pending the outcome of the Ninth Circuit's inquiry.

Judicial Discipline Reform

Explanations offered for H.R. 916 suggest that the resolution is strategically designed to send a message to the judiciary that if it does not police itself, Congress will reassert its authority to regulate judicial misconduct. This message is born of an understandable frustration with the Ninth Circuit Judicial Council's reluctance to investigate the complaint against Judge Real.

When the National Commission on Judicial Discipline and Removal issued its Report in 1993, its conclusion that the disciplinary system was working "reasonably well" was justified. That same year, I applauded the judiciary's informal resolution of disciplinary matters as an effective means to address misconduct that rendered frequent formal enforcement unnecessary.[23] In the intervening decade, however, circumstances have changed. Judges have come under attack from both sides of the political aisle and public confidence in the courts is in a state of flux.[24] The infrequency of formal judicial self-discipline has aroused suspicion among members of the House Judiciary Committee and the general public, and informal enforcement, almost by definition, occurs outside of public view.[25] In 1993, It has become increasingly clear that there is a value served by making policy-makers, the press and public better aware of the disciplinary activities that the federal judiciary undertakes. Vigilant and visible self-enforcement of the judicial discipline statute is one way for the judiciary to promote public confidence in the courts—and forestall resort by Congress to more draconian methods of court control that could undermine the judiciary's independence.

In this case, the Judicial Council's approach to the investigation of Judge Real has been less vigilant and visible than grudging, which gives the Committee understandable cause for concern, and renders the Committee's proposed inquiry into the conduct of Judge Real understandable. As discussed above, I think that an impeachment inquiry at this juncture is premature and ill-advised. If the problem lies with the disciplinary process, the Committee should explore further reform of the disciplinary process.

A core failure of the existing disciplinary regime in the federal courts is the hopelessly vague standard that it brings to bear in disciplinary actions. Under the statute, judicial conduct is assessed with reference to whether it is prejudicial to the

[23] Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 (1993).
[24] Charles Gardner Geyh, When Courts & Congress Collide: The Struggle for Control of America's Judicial System 3-4 (2006).
[25] *Id.* at 254.

administration of justice. So general a standard offers no clear guidance as to what does or does not constitute misconduct, and contributes to non-enforcement, because judicial councils are understandably reluctant to impose sanctions on judges for conduct that the judges may not know violates the statute.

There is an easy and obvious solution. The American Bar Association has a Model Code of Judicial Conduct, some variation of which has been adopted by virtually every judicial system in the United States, including the federal judiciary n its Code of Conduct for United States Judges. In almost every state, the disciplinary process is tethered to the Code of Conduct, which provides judges with detailed and explicit guidance as to conduct that is permitted, required and forbidden: When a judge is disciplined, the disciplinary authority will cite the specific provision of the Code that the judge violated.

Unfortunately, the federal judiciary has resisted linking its Code to the disciplinary process. One study found that the Code was referenced in only 3% or federal disciplinary actions, and the Code of Conduct for U.S. Judges explicitly divorces the Code from discipline. It is laudable that the federal judiciary encourages ethical conduct among its judges by inviting them to inquire into the appropriateness of their conduct under the Code without the specter of discipline hanging over their heads. But nothing forecloses the judicial conference from continuing to employ a committee that provides such advice on a confidential basis at the same time as the judicial councils utilize the Code for disciplinary purposes. Indeed, this bifurcation of responsibility—with one judicial entity offering advice about the Code on request, and another using the Code in disciplinary actions—is common practice among the state systems, and works quite well.

Judge Real's case exemplifies the problem. It is virtually stipulated that Judge Real engaged in an ex parte contact with a probationer. And yet the circuit council concluded that this aspect of the judge's conduct had been remedied by judicial review, thus obviating the need for disciplinary action. Such a conclusion ought to be unacceptable. The appellate court's order corrected the legal error the judge committed as a consequence of his inappropriate ex parte communication but did nothing to address the ethical impropriety of the communication itself. A simple application of the Code yields a clear answer: Canon 3A(4) declares that "a judge should . . . neither initiate nor consider ex parte communications on the merits, or procedure affecting the merits, of a pending or impending proceeding." Insofar as Judge Real engaged in an ex parte communication concerning a procedure affecting the merits of a proceeding, the communication ran afoul of the Code. The only question is what the sanction should be. The Code likewise includes guidance relevant to favoritism: Canon 2B states that a judge "should not allow family, social, or other relationships to influence judicial conduct or judgment." More generally, Canon 1 provides that a judge "should uphold the integrity and independence of the judiciary," the accompanying commentary to which explains that "The integrity and independence of judges depend . . . upon their acting without fear or favor." Whether Judge Real exhibited favoritism is a question of fact that a thorough investigation needs to explore, but if favoritism is found, the issue of whether such conduct is improper is once again easily answered by the Code.

The Judicial Conference could make its Code of Conduct for U.S. Judges applicable to disciplinary proceedings without enabling legislation by Congress. Alternatively, Congress could revise the disciplinary statute to link conduct prejudicial to

the administration of justice to the specific provisions of the Code. I see no separation of powers impediment to such a move, insofar as the judiciary retains control over the terms of the Code itself. If this change is made by the Conference or Congress, some hortatory language in the Code would need to be changed to mandatory. And some provisions would need to be revised: for example, the discipline statute properly exempts from its scope matters related to the merits of a dispute, and some provisions of the existing Code (such as Canon 3A(1), which instructs judges to "be faithful to . . . the law") may be closely intertwined with the merits of disputes. Such an effort, however, is well worth the time it takes, because it will ensure a more meaningful framework for disciplining judicial misconduct. Frivolous complaints can be dismissed as quickly as before, while more serious complaints can be investigated and resolved more systematically, fairly, and efficiently.

Mr. SMITH. Thank you, Professor Geyh.

Professor Hellman, let me direct my first question to you. You have just heard Professor Geyh say that the judicial council "didn't do its job" and "bungled the process."

How would you describe the investigation to date by the Ninth Circuit? Do you think they have done a good job of investigating this matter, or do you have another description of it?

Mr. HELLMAN. Well, I have another description. The Breyer Committee, in fact, concluded that both of the two chief judge dismissals and the second order of the judicial council were inconsistent with the statute.

Oddly enough, though, in my view, the clearest departure from the statutory procedures came in the circuit council's review of the first order dismissing the complaint. Because it is evident that the council thought that there were unresolved factual issues in the record before it. And that, strikingly, is why Judge Kozinski wrote the letter to Judge Real that led to the inaccurate response that Judge Real discusses in his statement.

But if the council thought there were unresolved factual issues, it should not have undertaken that investigation on its own at that point in the proceedings. It should have directed the chief judge to appoint the special committee, which it had the power to do.

Now, I think there were flaws elsewhere, but that, to mind, was the more egregious and most obvious.

Mr. SMITH. Okay. Thank you, Professor Hellman.

And, Professor Hellman and Mr. Smyth, my next question is this: Is there any doubt in your mind, either based on the record, Professor Hellman, or on your personal experience, Mr. Smyth, that Judge Real wanted the Canter litigation to be resolved in her favor?

Mr. HELLMAN. I don't think I can speculate about that. That, to my mind, is one of the issues that I would like to see the special committee address.

Mr. SMITH. Okay. And, Mr. Smyth?

Mr. SMYTH. Well, I think he simply—I think he wanted to do what she either asked for in the letter or she asked for—and that is give her more time. Ultimately I think he saw she couldn't get the house. But I think he wanted to give her—she wanted time for retraining. She asked for it, and he wanted to give it to her.

Mr. SMITH. Okay. Thank you, Mr. Smyth.

And, Professor Hellman, last question for you, and that is: What precedence are you aware of, historical precedence, that might apply to this case at hand?

Mr. HELLMAN. Well, I would like to say a little bit more about the Archbald case that both Professor Geyh and I have mentioned, because it is the strongest; it is the one of most interest here.

There were actually 13 articles of impeachment that were voted by the House against Judge Archbald. Now, six of those were based on conduct, or alleged conduct, that took place when Judge Archbald was a district judge, before he was appointed to the Commerce Court, and the Senate acquitted on all of those. So we can put those aside.

But the Senate also acquitted on one article, it happened to be article 2, that did allege specific quid pro quo corruption while Judge Archbald was a judge of the Commerce Court.

And, to my mind, it is very striking, the contrast between the Senate's acquittal on article 2 and its conviction on article 4. Because article 4, as I have said, within its four corners, didn't allege corruption, didn't allege criminality.

So this suggests two things to me: One, that the senators studied those articles rather closely; they didn't just vote en bloc for or against. And second, that the conviction on article 4, yes, it was part of a—the articles themselves alleged a pattern of corruption, but the senators didn't vote on a pattern. They voted on the individual articles. And article 4 didn't say criminality, didn't say corruption. They convicted anyway.

Mr. SMITH. Okay. Thank you, Professor Hellman.

And, Mr. Smyth, just want to get your opinion as to how you feel Judge Real treats litigants and attorneys in his court.

Mr. SMYTH. Well, I mainly appear in bankruptcy court, but after 30 years I have appeared in front of him 10 times. I have had one jury trial, a summary judgment proceeding.

I think the word is autocratic. He is pro-police. In the trial I had, I felt he didn't mind indicating to the jury what side he was on. I know judges in England can sum up, but here it is not forbidden but they never do.

But it is hard to say——

Mr. SMITH. How did the judge indicate to the jury what side he was on?

Mr. SMYTH. Well, there might be—this was a police case, and, you know, it could be imagination, but simply taking a request to—let's say, crossly-examining your witnesses, facial expressions. Of course everyone knows how he treats Mr. Yagman, who is—for police cases and, I suppose, talking rudely. And sometimes he is very arrogant and rude in the way he talks. We have an example in this case.

So I don't appear there very often, but I don't like appearing there.

Mr. SMITH. Okay. Thank you, Mr. Smyth.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Thank you, Mr. Chairman.

I really would like to use most of my time to ask our professors more on this issue of changing the process that we have legislated and amended in a way that you think would make it better. You start speaking to that in your testimony, but I haven't fully absorbed all that written testimony.

But, first, I just want to—Mr. Smyth, you stated as a, sort of, a factual certainty the receipt of a letter.

Mr. SMYTH. No. No, I did not. In fact, I said I didn't know if he got it. I know—I believe my wife that she——

Mr. BERMAN. No, no. I heard you. You——

Mr. SMYTH. Oh, no.

Mr. BERMAN. You said, "I don't know if he made his decision based on the letter" or—it came across to me as assuming he received a letter, which he has denied receiving.

Mr. SMYTH. No, no.

Mr. BERMAN. And I guess the only question I have for you is, do you have first-hand knowledge of whether or not such a letter was sent?

Mr. SMYTH. I am sure if you play the tape, I specifically said I don't know if he got the letter. It turns out it was a declaration. I don't know—the only knowledge I have is——

Mr. BERMAN. Okay. All right. Then you are saying I misunderstood your references to——

Mr. SMYTH. I do have knowledge of things that make it likely he did. But I specifically said here I don't know that he did or not.

Mr. BERMAN. I am sorry. Okay.

I, of course, Professor Hellman, was most intrigued by your inclusion of a footnote which indicates that Judge Kozinski's, I guess it was a dissent, which I haven't read yet. My theory is we shouldn't be doing this until after the special committee concludes its work and issues a report. And the corollary of that is, why read something until I have to?

But your footnote talks—"Judge Kozinski suggested that Judge Real be required to compensate the trust for the damage it suffered as a result of the judge's unlawful injunction." Meaning the injunction was reversed on appeal on the grounds there was no basis in law for the injunction?

Mr. HELLMAN. I am not sure whether he was referring solely to that or to the additional assumption that there was misconduct as well. It is hard for me to imagine he would be saying a judge should be required to compensate simply because his decision is reversed on appeal. It is hard enough to get people to become Federal judges today. I mean, nobody would take the position under that rule.

Mr. BERMAN. Yes. My fear was you would start extending it to Members of Congress for bad votes taken. I mean, there are consequences to this kind of suggestion that should make some of us have concerns.

But develop a little more, if you can, just synthesize in the remaining time, you and Professor Geyh, if you could, what kinds of changes should we be making in the law.

Mr. HELLMAN. Thank you. First, on that one, I think it is reasonably clear that a compensatory remedy would not be permitted under the current statute. It would be a very tough argument, and for the reasons you have indicated, I think that is a very doubtful line.

To my mind, the more promising line—and I have to say the Breyer Committee report reinforces this—would be to clarify even more—I think it is clear in the statute—but to clarify even more when the special committee has to be appointed.

Because in the high-profile cases that the Breyer Committee investigated, that was one of the repeated failings, that the chief judge did not appoint a special committee when he or she should have done so.

And so, maybe the statute could make absolutely clear that, in all but the most obvious cases, the chief judge does appoint a special committee.

The other aspect——

Mr. BERMAN. And by that, you mean create a legal situation where, essentially, the chief judge feels, if there are factual allegations which one assumes are true, would there be some basis for thinking there was wrongdoing, create the committee, rather than—in order almost to—it isn't the chief judge concluding that the judge did something wrong, but that, by operation of law in this situation, they really had no choice but to create the committee. Get the personal consequences—reduce the personal consequences of the decision about the difficult job of policing your own.

Mr. HELLMAN. Yes, and to make very clear that a formal investigation is a—anything like getting sworn declarations—this case presents, actually, a very good example of that. The statute draws a line between the limited inquiry—that is the word in the statute—the limited inquiry that the chief judge can conduct and a formal investigation, which implicitly is the special committee.

Well, the chief judge got sworn declarations. And it seems to me that, when you are getting sworn declarations, that is a formal investigation. And that tells you, appoint a special committee. But——

Mr. BERMAN. Mr. Chairman, may I have one additional minute?

Mr. SMITH. The gentleman's time has expired. Without objection, he is recognized for an additional minute.

Mr. BERMAN. In my unfortunate concurring capacity as the Ranking Democrat on the Ethics Committee, the similarities of problems and difficulties between the concept of self-discipline in the judicial branch and the difficulties we face in the legislative branch, the parallels are very interesting.

Professor Geyh, what do you think of this notion of tilting more toward the more formal investigative committee?

Mr. GEYH. Well, I think it is a good idea for the reasons the Breyer Committee gives. And it seems to me that one desirable outcome of this would be for the Subcommittee to take a look at the Breyer Committee report, in its oversight capacity, to work with the Judicial Conference to make sure that they promptly adopt the recommendations of the Breyer Committee.

I think that it is true that if district judges are out on their own, engaging in fact-finding that is less than complete, it does this process a disservice. That the norm, when there are factual issues to be found, ought to be to create an investigative committee. And what the Breyer Committee says is, that ought to be our new norm; that ought to be the way we do business.

I don't think—whether we need legislation that makes it unalterable worries me a little, because in some situations it may not be necessary. But that ought to be the norm.

And that is really where I think this Committee could do the most good, is in ensuring that this Breyer Committee report isn't just deepsixed.

Mr. SMITH. Okay. Thank you, Mr. Berman.

The gentleman from California, Mr. Gallegly, is recognized for questions.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

And I apologize for coming in a few minutes late. I would like to have asked Judge Real a couple questions, but that didn't take place because of my absence.

I was the first non-lawyer on this board, and, as a result of that, I am always a little more careful when you are dealing with some very technical issues. And I do more listening than talking, normally. When you start talking, you stop learning, around this place.

I did find it very interesting—is it "Smith" or "Smythe"?

Mr. SMYTH. "Smith" with a "Y," your honor—pardon me, Mr. Gallegly.

Mr. GALLEGLY. Okay. Mr. Smyth, your assessment of Judge Real's, for lack of a better word, demeanor on the bench seemed to be—you had some fairly strong opinions of that, which I assume has been a result of several years of experience.

Mr. SMYTH. Well, I am not really the person to ask, because I probably had 10 appearances. And he is not real exceptional. There are two other Federal judges in Los Angeles I would—you know, it is not quite like bankruptcy court or municipal court. It is not as relaxed. If you are not careful, you will be knocked down a bit.

So I would say this: He is not, let's say, unfair. But he is an autocratic-type judge.

Mr. GALLEGLY. Well, let me ask you this. Have you had any experience or any opinion of Stephen Yagman?

Mr. SMYTH. Only what I have read. I have done some similar police-type cases, and I have read a lot about him, so I do have some opinions.

Mr. GALLEGLY. And what would those opinions be?

Mr. SMYTH. Well, he is almost sort of reckless in the way—he is for suing the police, but the way, for instance, he accused Judge Keller of being a drunk simply so he could have Judge Keller recuse himself. That sort of typifies—and, of course, I know his problems now with the taxes. And he is a self-promoter.

But, I mean, he does a good job in suing police officers who have misconduct. And I understand he has had a running battle for years with Judge Real.

Mr. GALLEGLY. Does he have a reputation of bringing lawsuits against cities and counties for the conduct of their police officers?

Mr. SMYTH. Yes.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Gallegly.

The gentlewoman from California, Ms. Waters, is recognized for questions.

Ms. WATERS. Thank you very much, Mr. Chairman and Members.

I would like to ask the witnesses a little bit about this process. I have spent some time here reading Mr. Yagman's background and his actions. And it seems that there is an element of revenge here, based on a decision by Judge Real that sanctioned him and caused him to have to pay $250,000. It was reversed. However, Mr. Yagman appears to have put a lot of time in going after Judge Real. And it appears to be consistent with his behavior, some of which has been alluded to here earlier.

Now, I am wondering this. If, in fact, this case had gone to the special committee, is there anything that would have allowed them to make a special finding about who Mr. Yagman was, whether or not this was a credible complaint, whether or not it was a revenge complaint, whether or not his actions in this case and other cases would deem him to be someone who was not credible.

What I am wondering is, you mentioned that there are some things that maybe need to be looked at for the future, that perhaps there are some areas to be improved.

I have heard a lot about areas that could be improved, as it has to do with the judicial council or with the chief justice. But I want to know if there has been any discussion about those who bring complaints and whether or not there can be a finding and, following the first hearing of the special committee, there will be no more actions taken, because the finding that was made by that special committee was such that this was not a legitimate complaint.

Mr. GEYH. It is possible for the chief judge to dismiss complaints as frivolous, and a significant percentage of them are.

I am a little bit leery about creating, sort of, presumptions based upon who the complainant is, in part because a significant measure of these complaints are filed by prisoners and others who it might be very easy and quick to say are inherently unbelievable and we will disregard what they have to say.

In some ways, I am comfortable with the notion that the chief and the committee, if warranted, will take a look to see beyond who is making the complaint, to see if there is any "there" there. And if there is, conducting an investigation, even if the source of the complaint is suspect.

I understand your point, and there is—I mean, the vast majority of complaints are dismissed before any investigation is undertaken, for all the right reasons.

Ms. WATERS. Well, if I may interrupt you, I certainly don't mean that there could be a finding that this person's past actions alone should create a situation where they could go no further in investigating or coming here to the Congress of the United States.

But I do think that there should be something that would take into consideration the relationship between the one making the complaint and the judge. Whether or not there has been a case where the complainant has been disadvantaged, had been sanctioned, in some way that would cause them to want to get back. And whether or not they took extraordinary actions to get back at the judge, who, you know, ruled against them.

I mean, I do think that is in addition to, not simply looking at the background of a person and the fact that they may have been involved in other actions or complaints, but as it relates to this particular judge.

Mr. GEYH. No, point taken. In the current framework—and, Professor Hellman, help me out here if I am wrong—I think that the nature of the witness is going to be germane only insofar as it bears on the truth or falsehood of the accusations being made.

Mr. HELLMAN. Yes, I agree with just about everything Professor Geyh has said.

And I would add this one point: Congress made a very considered and conscious decision in 1980 to let anybody file a complaint. And

I think one of the reasons they had for that—in this case, you had somebody who has absolutely no connection to the case who just comes in out of nowhere.

But I think Congress thought, and I think it was a very good decision, to simply let insiders or people who were involved, that would not necessarily reveal misconduct. But the consequence is that, sometimes, it sort of goes too far in the other direction.

But I think the judges can deal with this under the current system, and they will, as Professor Geyh says, simply dismiss the complaints that are filed out of vindictiveness or maliciousness.

Ms. WATERS. Well——

Mr. SMITH. Thank you, Ms. Waters. Your time has expired.

Ms. WATERS. Thank you.

Mr. SMITH. Thank you.

The gentleman from California, Mr. Issa, is recognized for his questions.

Mr. ISSA. Thank you, Mr. Chairman.

And I, too, like Mr. Gallegly, am not an attorney. So a lot of time, trying to understand the complexity of what is right or wrong for a judge requires that I draw on 20 years of business and anecdotal examples.

But, Professor Hellman, perhaps you could help me with this. Almost 30 years ago, I had an artisan's lien against goods that I had manufactured in house, physically in my plant. Classic example: Company filed for bankruptcy. Their bank, who had a lien but an inferior lien to the mechanic's lien, tried to get the assets out; went to Federal court. The bankruptcy judge said, "I will give you the"—and I can never pronounce this properly—"the indubitable equivalent." And he took my goods. I never got a penny. Had first and best lien; I was screwed.

I understood the power, from that day forward, that a bankruptcy judge had, or any Federal judge, to ignore with impunity what is in fact clear, established law and predictable outcome in most cases. And there is nothing you can do about it.

In this case, it appears as though the Federal judge, who was a bankruptcy judge, specifically an appointed judge for that, made an appropriate ruling, sans this other piece of information.

That, if you did not have—and there has been no evidence placed here today, including by the judge himself, that he had any knowledge of some specific court ruling that said, "You are getting this house as part of a settlement. Your ex-husband is supposed to pay his father"—any of these other things that have been talked about or surmised. Based on bankruptcy law, that house should have been vacated or paid for.

This judge made a decision to take that decision away from the bankruptcy judge without showing cause and without specifically showing his cause for the cause here today.

In your experience, is that out of the ordinary? And does that imply some level of hubris, whether or not it is impeachable?

Mr. HELLMAN. Well, from what we have heard, it seems as if there were aspects of this case that were out of the ordinary.

There is one other point, though, that your questions raise and which I think has not adequately been dealt with up to this point

today, which is that there is something of a tension between the misconduct process and the appeal process.

I mean, I think the ordinary assumption is that errors, even gross errors, awful errors, that judges make will be corrected in the appeal process.

And my understanding—I have to say, by the way, bankruptcy is one of those areas of law that I just shrink from. I have no background in it, and the technicalities I find just beyond me.

Mr. ISSA. Apparently that is because you are not just any district judge, who, by definition, is a bankruptcy judge and has primary authority.

Mr. HELLMAN. But one of the things I understand that Congress did do was to make, at least in the more recent statutes, perhaps not at the time that you were involved in that matter—one of the things that Congress has done is to make appeals easier, as a general rule, in bankruptcy. So that, in bankruptcy—if there are bankruptcy people around, they will probably correct me, but my understanding is that it is much easier to take an appeal in the middle of a case in a bankruptcy proceeding than it is in district cases.

So that is one of the things that Congress can do—I guess bankruptcy isn't this Subcommittee either, so we are all lucky in that respect, but one of the things——

Mr. ISSA. It took us three Congresses to get a new bankruptcy law passed. I am sure it will be three more before we start talking about a new one.

Mr. HELLMAN. Well, but——

Mr. BERMAN. Will the gentleman yield?

Mr. ISSA. Of course.

Mr. BERMAN. I think we can say, based on your comments earlier and now, that, had you been here in the late 1970's and 1980's, you would have been on the Kastenmeier side of the Rodino-Kastenmeier fight about Federal judges and bankruptcy judges.

Mr. ISSA. Reclaiming my time, I have no doubt I would have been on one side. [Laughter.]

So, with the intricacy of this, do you think that it is appropriate for a district judge to take something and, without the facts—as the judge stated here today, he didn't have them. He is only surmising today that these things existed in a case that he never saw. He never saw the State case. He simply said, I have got a bankruptcy judge who made this decision. The case record included something which, although I understand is not illegal by any means, as the judge said, but in fact he thought inappropriate to be considered, reversed a case in bankruptcy.

I go back to the same question for any of the three panelists, since the red light is blinking: Doesn't this reek of hubris of a judge who has simply said, "I have all the power, I will do what I want to do and let the appellate court decide if they don't like it later"?

Mr. HELLMAN. Just a very, very quick response. My initial reaction, reading that passage in Judge Real's statement, was to ask, wouldn't it have been easier just to ask the bankruptcy judge first and wait to get an answer before taking action?

Mr. ISSA. Anyone else, quickly, since we are blinking?

Mr. GEYH. My reaction is to say that what you are describing might well constitute reversible error. And does it require an ele-

ment of hubris? The answer is perhaps. I think it is important to understand that the Code of Judicial Conduct talks in terms of judicial demeanor as well. This might, likewise, be the subject for judicial discipline in appropriate cases.

I get very nervous, however, when we start talking about impeaching judges because their decisions are inappropriate, even outrageously inappropriate. That is where I start drawing the line, for myself.

Mr. SMYTH. I have a comment. I disagree—you made a comment that seemed to say bankruptcy judges aren't constrained by the rules as much as others. They are.

I think you were the victim of what they call a preference action, where your own property, undoubtedly belongs to you, still give it to a trustee; it seems unfair. Yes, it does seem to be, but this is not the only Federal judge who says, "I am the judge, and I will do it, and see if you can reverse me." That is what it seemed like.

Mr. SMITH. Thank you, Mr. Issa.

Mr. ISSA. Thank you.

Mr. SMITH. The gentleman from California, Mr. Schiff, is recognized for his questions.

Mr. SCHIFF. Professor Hellman, the standard for impeachment, the power that we have to impeach, is that the same standard that is applied whether we are impeaching a Federal judge or impeaching a Member of Congress or impeaching a president of the United States? Is it the same standard?

Mr. HELLMAN. The constitutional standard is the same one. There is only one standard in the Constitution. It says, "treason, bribery and other high crimes and misdemeanors."

Mr. SCHIFF. So if the standard was—whether you are autocratic or not, we could impeach a lot of our Committee Chairmen. [Laughter.]

Present company excluded, of course. He would only be censured. [Laughter.]

But others——

Mr. HELLMAN. Might I add just one thing to that, though? Because I think the term "high crimes and misdemeanors" is misleading if it is read as focusing on criminality in the ordinary sense.

There is some useful material on that in Professor Geyh's statement, because what he points out there is that the framers distinguished between ordinary crimes, which would be prosecuted through the courts, and what they called political offenses—I think that was Hamilton's word—that would be punished by the legislature through the impeachment process. And what that looks——

Mr. SCHIFF. Mr. Hellman, I only have 5 minutes. I am sorry.

Mr. HELLMAN. Sure.

Mr. SCHIFF. But you may be able to get some of that material in, in the form of my questions.

But what I was interested in was, you made a statement during your original testimony that there were no allegations here of criminality or corruption, and that it would be extraordinary, if not unprecedented, to impeach a judge on the basis of allegations that did not approach criminality or corruption.

Mr. HELLMAN. Correct.

Mr. SCHIFF. It seems to me that, you know, there have been statements about the judge's judicial temperament. There have been questions raised about whether the case should have been withdrawn from bankruptcy.

But the gravamen of the complaint is the ex parte contact. Without the allegation of an ex parte contact, it may be reversible error, as Mr. Geyh points out, but it would be even more extraordinary, in terms of an impeachable case, because you wouldn't have criminality, you wouldn't have corruption, which we don't have even if you accept all the allegations as true. But then you would have nothing, really, more than judicial temperament and a reversible error.

Isn't the gravamen of the complaint here the ex parte contact?

Mr. HELLMAN. I agree with you, without the allegation of ex parte contact, I think you are clearly below the standard, yes.

Mr. SCHIFF. We don't have the opportunity, I think, here to really delve into whether the ex parte contact took place or not. The judge has said it didn't. There are a lot of questions, Mr. Smyth, I could ask you about that, because part of the allegations involve your wife, as I understand them. But in my 2 minutes remaining, we don't have time to do that.

But I did want to ask, and I guess, Professor, you might be the right—and Mr. Geyh, as well—you have proposed that when there are substantial allegations, that a special committee—that the presumption should be a special committee should be formed.

And I guess the one question I would have on that is, here we have a case where somebody completely removed from the complaining conduct, Mr. Yagman, is the complainant. So, not a party to the proceedings, no percipient knowledge, someone who arguably read about this in the paper and decided this is a way to file a complaint against this judge, someone who is now, as I understand, under indictment himself, has the ability to initiate this.

And I don't know that we want, in circumstances like that, everyone to be able to initiate a special committee. Would it be a better remedy, in part, to provide—and I actually had a statutory fix for this. The Judicial Conference said they couldn't intervene because no committee had been formed.

Couldn't either the Judicial Conference on its own or the Congress legislatively change the law, such that, whether a special committee is created or not, the conference would have the ability to intervene? Is that a potential remedy?

Mr. HELLMAN. Yes.

And first, just to clarify, I am not saying that a special committee should be formed in the ordinary case, because the vast majority of cases—of complaints—are plainly without merit, and I wouldn't want a special committee in those.

But I think what you suggest is a very promising route. For example, one simple fix that would have taken care of this case would be to say that any one member of the judicial council can authorize an appeal to the Judicial Conference. So that would get it even if there was no special committee. And that would broaden the availability of a Judicial Conference review.

Mr. SCHIFF. This goes to the issue——

Mr. SMITH. The gentleman's time has expired, but, without objection, he is recognized for an additional minute.

Mr. SCHIFF. Thank you. And I will be briefer than that.

This goes to the point that Mr. Berman was making, which we are wrestling with in the Congress too, about whether to allow outside complaints against Members of Congress, as opposed to only internal complaints.

And, of course, the risk is you get political opponents making complaints. The risk for a judge is that you get aggrieved litigants making complaints. And that affects their independence on the bench in future cases.

Anyway, I appreciate your testimony.

I yield back my time, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Schiff.

I would like to thank all Members for their interest and for their attendance, and also our witnesses for their testimony today.

This has all been very, very helpful. Thank you, again.

We stand adjourned.

[Whereupon, at 11:15 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman,

One of the primary responsibilities of the Subcommittee is to work to insure that our judicial branch maintains its independence. Therefore, while there may be a "question" as to whether certain judicial behavior was or was not appropriate, and what the correct response should be, this congressional hearing on the impeachment of Judge Manuel Real is premature. As I understand it, the Ninth Circuit on May 23, 2006 convened a special committee to investigate the charges against Judge Real and that a closed door hearing on the matter was held on August 21, 2006, and the investigation is ongoing.

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 established our current system of judicial self discipline. It authorized the establishment of a Judicial Council in each of the thirteen federal circuits that would be responsible for the review of complaints against federal judges and it empowers the Councils to suspend the judge, or publicly or privately reprimand the judge. When a complaint is received, the chief judge reviews it, and either dismisses the complaint as baseless or—if it has merit—the chief judge can assemble a special committee to make factual findings and refer the matter to the entire Judicial Council, who may then conduct any additional investigation it deems necessary. Finally, the complaint may be petitioned to the United States Judicial Conference for review, and the Judicial Conference may refer the complaint to the House of Representatives for consideration of impeachment.

Following hearings in this Subcommittee, this act was amended—with bipartisan support—by the Judicial Improvements Act of 2002. This amendment enables the chief judges to conduct limited inquiries into the complaints.

On April 29th of this year the Judicial Conference held that it had no jurisdiction to review the Judicial Council's actions because no special committee had been appointed and factual disputes exist that could benefit from a special committee review. In May, the Ninth Circuit Chief Judge responded by appointing a special committee to investigate. This special committee investigation is in-line with the established procedures, and I contend this is the proper procedure to be followed.

I think we should have held off on this hearing in order to allow the special committee to perform its job.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

The abuse of judicial authority is troublesome and dangerous not only to the parties it affects, but to the very stature of the judiciary.

However, impeachment of a federal judge for noncriminal activity deserves the closest of scrutiny and a fair process. I don't believe this resolution meets either of those demands.

First, this resolution is premature. A Special Committee of the Ninth Circuit is currently investigating the charges against Judge Real. That committee was lawfully appointed pursuant to statute, has subpoena authority, and will issue a full report with recommendations. The Committee most recently conducted closed-door hearings in August.

There is no reason to intervene in the current process. This committee passed the Judicial Improvement Act of 2002—affirming this process—on a voice vote, with vocal support from both sides of the aisle. It is completely improper for the committee to now intervene because it simply does not like the results of that process or because it thinks it is moving too slowly.

Second, the Resolution rushes to judgment on the factual issues when the Chief Judge of the Ninth Circuit has twice dismissed the complaint against Judge Real. Truly, a matter of such import should not be conducted in an ad hoc and rushed fashion. Impeachment of a federal judge for noncriminal activity is exceedingly rare, as it should be, and must be afforded all the protections and procedures of regular order.

I respect the Chairman's concerns with enforcing judicial discipline, but we actually discourage the Judiciary from policing itself when we intervene to mandate Congressionally preferred results. Truly, what will be the incentive to pass judgment on one another when Congress will substitute its own judgment at will?

That being said, I look forward to hearing the various factual accounts from our witnesses today and discussing the rigid standards of impeachment that exist in this arena.

LETTER TO THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY, AND THE HONORABLE HOWARD BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY, FROM GARY CANTER OF LOS ANGELES, CALIFORNIA

Fax Number: 202-225-3673

September 12, 2006

To Chairman Larmar Smith and Ranking Member Howard Berman:

My family and I went through a great deal of turmoil and anguish due to Judge Real's "Insider Trading Tactics" with my ex-wife, Deborah Canter, and their meeting behind closed doors privately in his chambers.

While the whole ordeal with my ex-wife and Judge Real was occurring I was forced to move back home with my parents for four years ... as a man this is a very belittling experience to be forced to live in the same room that you lived in when you were ten. (I am 47 years old now.)

The embarrassment of having to move back home with my mother and father, on top of the out lavish legal bills (between $10,000 - $20,000 per month, totaling $200,000) was the direct cause of a major heart attack that I suffered on September 21, 2000. This was just sixty days after Judge Real's ruling against my family.

The left anterior descending portion of my heart had severe 95% blockage. This is called the "Widow Maker" and in many cases causes death instantly. Additionally, there was 95% ostial diagonal, as well as 95% first septal. The right coronary artery was totally occluded at the crux.

Six years after my heart attack, I still suffer a great deal of pain on a daily basis on the left side of my chest.

My ex-wife, Deborah Canter, left her pre-trial sentencing report in my car under the seat. In that report she states that she had all of the problems with my family due to the fact that we wanted her to convert to Judaism. This could not have been any further from the truth and was an outright lie. Deborah Canter knew that Judge Real was a Catholic and she played this religious manipulation for all it was worth.

I come from a family where my Grandparents came to America in 1910 with nothing. My grandparents worked day and night so that their grandchildren could have a better quality of life and to never see everything they worked so hard to create almost go down the drain.

This is the United States of America.

Sincerely,

Gary Canter
419 N. Fairfax Avenue, Los Angeles, CA 90036
323-574-3559

CEDARS-SINAI MEDICAL CENTER

PATIENT: CANTER, GARY P
MED REC: 000886059
DICTATOR: LAURENCE SEIGLER, M.D.

DISCHARGE SUMMARY

DATE OF ADMISSION: 09/21/2000

DATE OF DISCHARGE: 10/06/2000

HISTORY OF PRESENT ILLNESS: This patient is a 41 year-old male with a history of nephrolithiasis, approximately one month ago, who presented with substernal chest pain lasting 25 minutes, only to recur the next day with no relief. He was brought to the Emergency Department where a diagnosis of acute myocardial infarction was made; and he was subsequently admitted to the Coronary Care Unit.

On admission, his blood pressure was 142/78, pulse 76, respirations 16. He was a gregarious man, sitting in bed, in no apparent acute distress. Pertinent findings included conjunctiva pink; sclera white; a loud S4 over the precordium. The lungs were clear.

Pertinent laboratory studies on admission revealed a sodium of 144, potassium 3.8, chloride 104, bicarbonate 30, BUN 10, creatinine 1.0, random glucose 144. Calcium 9.0, magnesium 2.0, glycohemoglobin 5.4, AST 53, ALT 55, alkaline phosphatase 39. Albumin 4.0, globulin 2.4, cholesterol 200, triglycerides 342, HDL 33, cholesterol HDL ratio 6.1. Homocysteine level 7.2, which is normal. Lipoprotein A 22, which is normal. Troponin initially was 0.8 and rose to 61. Ethanol level none detected. Substance abuse panel opiates to be confirmed; benzodiazepines detected. White blood cell count 7,800, hemoglobin 16.7. Postoperatively, his hemoglobin was 9.2, but rose in a steady fashion. Urinalysis revealed no protein or cells. Blood type AB+. Human immunodeficiency virus negative. Blood cultures negative. Urine culture negative. Electrocardiogram revealed sinus rhythm, left axis deviation, inferior posterior infarction, of undetermined age.

HOSPITAL COURSE: The patient was admitted to Coronary Care Unit. He underwent coronary catheterization, angiography; which revealed severe 90% proximal left anterior descending stenosis and 95% diagonal ostial stenosis. He was seen in consultation by Drs. P.K. Shah and Alfredo Trento. On 09/25/2000, the patient underwent three vessel coronary artery bypass grafting surgery with left internal mammary artery to the left anterior descending, obtuse marginal with a left radial artery, and to the intermediate with a second segment of the left radial artery. At surgery, acute myocardial infarction with discoloration of the inferior wall was observed. There were moderately calcified vessels.

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CEDARS-SINAI MEDICAL CENTER.

PATIENT: CANTER, GARY P
MED REC: 000886059
ATTENDING: RAJENDRA MAKKAR, M.D.
DICTATOR: ANDREW BOWMAN, M.D.

CARDIAC CATHETERIZATION
09/21/2000
CINE #: 57671

CC: CARDIAC CATHETERIZATION LABORATORY

PROCEDURE: Right and left coronary angiogram.

SITE OF ENTRY: Right femoral artery.

MEDICATIONS: Intravenous and Fentanyl and subcutaneous Xylocaine.

INDICATIONS: This is a 41-year-old male patient with a past medical history of hypertension. He is a nonsmoker and denies hypercholesterolemia or family history. The patient presents with approximately 36 hours ago having developed chest pain. For the last 12 hours or so, the chest pain has become severe and as of this morning, the chest pain was described as persistent, severe chest pain. He presented to the emergency room. He had subtle ST segment elevations in the inferior leads and was taken straight to diagnostic catheterization. His creatinine is 1.0, troponin is 0.8, platelet count is 253,000.

PROCEDURE IN DETAIL: Following informed consent, the patient was brought to the cardiac catheterization laboratory, where he was prepared and draped in the usual sterile fashion. One percent Xylocaine was used to infiltrate the right groin for anesthesia. The right femoral artery was cannulated with an 18-gauge Cook needle and a modified Seldinger technique, and a #6 French sheath was inserted and flushed.

A #6 French JR-4 catheter was advanced to the right coronary system, where numerous views were obtained by cineangiogram. The left coronary artery had an anomalous takeoff high up above the left sinus of valsalva. After numerous attempts by multiple catheters to intubate the left coronary ostium, it was eventually intubated, and left coronary angiogram was performed. The catheter that finally intubated the left coronary ostium was a #6 French XB-3.5 catheter.

No left ventriculogram was performed.

HEMODYNAMICS: Opening pressure was 149/87.

CORONARY ANATOMY: The left main had an anomalous takeoff above the left sinus of valsalva. The left main was normal. The left anterior descending had severe 95% proximal left anterior descending stenosis. There was a 95% ostial diagonal as well as 95% first septal. The rest

of the artery had some mild disease. The left circumflex had a subtotal circumflex stenosis involving both the obtuse marginal and the circumflex marginal. The right coronary artery was totally occluded at the crux, with a large amount of thrombus in the vessel. Once the artery was opened, there was subtotal disease in the first posterolateral branch as well as moderate disease in the additional main posterolateral branch.

This is a right coronary artery dominant system.

SUMMARY: 1. Acute myocardial infarction secondary to total occlusion of the right coronary artery. 2. Severe left anterior descending, severe diagonal, and severe circumflex disease.

It was decided to do percutaneous transluminal coronary angioplasty and stenting at this sitting. Please seek this on the next dictation.

Dictated by ANDREW BOWMAN, M.D.

:YOG/04896088/sew D: 09/21/2000 T: 09/22/2000 JOB#: 26240

5/31

CEDARS-SINAI MEDICAL CENTER.

PATIENT: CANTER, GARY P
MED REC: 000886059
DICTATOR: LAURENCE SEIGLER, M.D.

HISTORY AND PHYSICAL EXAMINATION
DATE OF ADMISSION: 09/21/2000

IDENTIFICATION: AGE: 41. SEX: Male. RACE: White. MARITAL STATUS: Separated. OCCUPATION: Restauranteur. INFECTIOUS DIAGNOSIS: No contact with tuberculosis, no isotropes, no steroids, no anticoagulants.

CHIEF COMPLAINT: Chest pain.

HISTORY OF PRESENT ILLNESS: The patient is a 41-year-old man who suffered from a left nephrolithiasis approximately one month ago. He considers himself to be in good health until two days prior to admission when he noted the onset of substernal chest pain and slight numbness in his right forearm. The intense pain lasted about 25 minutes. He did have some residual aches. He awoke the next morning with severe pain, no nausea, some sweating. He went to the emergency room. The diagnosis of acute myocardial infarction was made. He was promptly admitted to the Coronary Care Unit where he had angiogram and angioplasty and a stent. He has multiple vessel disease and is now contemplating bypass surgery.

FAMILY HISTORY: Mother is 61 and has elevated cholesterol. Father is age 64 and has diabetes mellitus. Sister, age 39, and brother, age 35, are both in good health.

MARITAL STATUS: The patient has been married for 13 years. He is in the midst of divorce now.

CHILDREN: One daughter, age 9, in good health.

CHILDHOOD DISEASES: None.

ADULT DISEASES: See above and below.

GEOGRAPHIC: The patient was born in Los Angeles and has lived here all his life. He had overseas travel.

REVIEW OF SYSTEMS: HEAD AND NECK: No history of head or neck pain. **EYE, EAR, NOSE OR THROAT:** No history of double vision, no acute sinus pressure, earaches or postnasal drip. **CARDIOVASCULAR:** See history of present illness. **RESPIRATORY:** No history of cough or shortness of breath. **GASTROINTESTINAL:** No history of nausea, vomiting, diarrhea or constipation. **GENITOURINARY:** No pain since the kidney stone episode. It is felt that the stones passed spontaneously. **NEUROMUSCULAR:** No history of previous paralysis or paresthesias. **PSYCHOLOGICAL:** No history of inappropriate behavior.

HERBERT KATZ, SBN 33474
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Attorneys for Creditor ALAN CANTER and
THE CANTER FAMILY TRUST

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re

Deborah M. Canter

DISTRICT COURT CASE NO.:

CV00-01185 R

BANKRUPTCY CASE NO.:

LA99-49126-AA

(Chapter 7)

SUPPLEMENTAL DECLARATION OF ALAN CANTER IN RESPONSE TO OPPOSITION TO MOTION TO VACATE ORDER OF FEBRUARY 29, 2000 STAYING JUDGMENT IN LOS ANGELES MUNICIPAL COURT CASE NO 99U18116

Date : July 24, 2000
Time : 10:00 a.m.
Court: The Honorable Manuel L. Real
Courtroom 8

C:\Chester\Canter\D Canter\Pleadings\Supplemental Opposition.wpd

I, Alan Canter, declare:

1. I make this Supplemental Declaration in response to the Declarations of Deborah M. Canter, Andrew E. Smith and Vicky Bascoy filed in Opposition to Motion Vacating Stay Order of February 29th, 2000. The facts stated herein are within my personal knowledge, are true and correct and, if called to testify thereto, I could and would competently be able to so testify.

2. I am the father of Gary Canter ("Gary") who is presently involved in a marital dissolution proceeding with Deborah M. Canter ("Deborah").

3. This Declaration supplements my previous declaration filed on July 10, 2000 as Exhibit 2 to the Response to Opposition to Motion to Vacate Order of February 29, 2000, Staying Judgme Los Angeles Municipal Court Case No 99U18116.

4. Despite statements of Deborah M. Canter, Andrew E. Smyth and Vicky Bascoy to the contrary, the true facts surrounding the acquisition by me and my wife of the property located at 446 South Highland, Los Angeles, California (the "Property") are, as stated in my previous declaration and as shown by my records, including the records of the Wilshire Escrow Company, which we received in connection with the purchase of the Property, true and correct copies of which are attached hereto and incorporated herein and into my previous declaration as though fully set forth herein, as follows:

Exhibit 1 — Documents from Wilshire Escrow Company, escrow number 96854, including the closing statement showing a down payment of $322,000.00 by wire transfer. This payment is in addition to the deposit of $10,000.00 made out of my wife's and my account to open the escrow.

Exhibit 2 — A copy (front and back) of the $10,000.00 check out of my wife's and my account at Wells Fargo to open the escrow for the Property.

Exhibit 3 — A copy of the letter of authorization to Union Bank to wire transfer $332,000.00 to the account of Wilshire Escrow Company regarding escrow number 96854. This amount plus the $10,000.00 constituted the down payment on the Property.

Exhibit 4 — Copy of Safeco Insurance Company insurance policy on the Property showing my wife and me as the named insured.

Exhibit 5 Documents from Wilshire Escrow Company, escrow number 97738-005 of May 20, 1992 evidencing a refinance of the Property by my wife and me showing that the Property is held as our community property.

5. All of the funds used to acquire the Property were funds of mine and my wife's and Gary Canter has no, and never has had, any interest in those funds.

6. There is no evidence, written or oral, to support the allegation that Gary Canter and/or Deborah M. Canter have any interest in the Property.

7. The facts stated in the Declaration of Vicky Bascoy as to the acquisition of the Property are simply incorrect, unsubstantiated and not borne out by the facts as I have stated and the documents attached hereto.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed at Los Angeles, California, this 19 day of July, 2000.

Alan Canter

Alan Canter, Declarant